In March 2002, the Court appointed the Committee on the Rules of Criminal Procedure. It was directed to "survey relevant Michigan Court Rules and examine proposed amendments to determine whether revisions or new provisions [were] warranted due to changes in the law, to clarify existing law, or to improve the delivery of justice."[1] The Committee was composed of the following judges, prosecutors, defense attorneys, and academicians:

Hon. Dennis C. Kolenda, Chairperson
Timothy A. Baughman, Reporter
Hon. Marylin Atkins
Hon. Linda S. Hallmark
Hon. Elizabeth Pollard Hines
Hon. Peter D. Houk
Hon. Paul L. Maloney
Joseph T. Barberi
Kenneth R. Chadwell
Margaret Erdeen Davis
Stuart J. Dunnings, III
Neil H. Fink
David Griem
Steven M. Kaplan
Eugene R. Milhizer
Stephen J. Murphy, III
John R. Nussbaumer
Joyce F. Todd
Gary L. Walker

Although the Committee was appointed for a two-year term ending March 12, 2004, it completed its work in slightly over half the time allotted. It produced the following document that recommends changes in each subchapter of the Rules of Criminal Procedure.

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[1] Administrative File No. 2001-43 (Order entered March 12, 2002, effective immediately).

RULE 6.001 SCOPE; APPLICABILITY OF CIVIL RULES; SUPERSEDED RULES AND STATUTES

(A) Felony Cases. The rules in subchapters 6.000-6.500 govern matters of procedure in criminal cases cognizable in the circuit courts and in courts of equivalent criminal jurisdiction.

(B) Misdemeanor Cases. MCR 6.001-6.004, **6.006,** 6.106, 6.125, 6.427, 6.445, and the rules in subchapters 6.600-6.800 govern matters of procedure in criminal cases cognizable in the district courts.

(C) Juvenile Cases. The rules in subchapter 6.900 govern matters of procedure in the district courts and in circuit courts and courts of equivalent criminal jurisdiction in cases involving juveniles against whom the prosecutor has authorized the filing of a criminal complaint as provided in MCL 764.1f.

(D) Civil Rules Applicable. The provisions of the rules of civil procedure apply to cases governed by this chapter, except

(1) as otherwise provided by rule or statute,

(2) when it clearly appears that they apply to civil actions only, or

(3) when a statute or court rule provides a like or different procedure.

Depositions and other discovery proceedings under subchapter 2.300 may not be taken for the purposes of discovery in cases governed by this chapter. The provisions of MCR 2.501(C) regarding the length of notice of trial assignment do not apply in cases governed by this chapter.

(E) Rules and Statutes Superseded. The rules in this chapter supersede all prior court rules in this chapter and any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in this chapter.

Committee Comment

No change, other than recognition of new MCR 6.006 regarding use of video technology, applicable in district court as well as circuit court.

RULE 6.002 PURPOSE AND CONSTRUCTION

These rules are intended to promote a just determination of every criminal proceeding. They are to be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

Committee Comment

No change.

RULE 6.003 DEFINITIONS

For purposes of subchapters 6.000-6.800:

(1) "Party" includes the lawyer representing the party.

(2) "Defendant's lawyer" includes a self-represented defendant proceeding without a lawyer.

(3) "Prosecutor" includes any lawyer prosecuting the case.

(4) "Court" or "judicial officer" includes a judge, a magistrate, or a district court magistrate authorized in accordance with the law to perform the functions of a magistrate.

(5) "Court clerk" includes a deputy clerk.

(6) "Court reporter" includes a court recorder.

Committee Comment

No change.

RULE 6.004 SPEEDY TRIAL

(A) Right to Speedy Trial. The defendant and the people are entitled to a speedy trial and to a speedy resolution of all matters before the court.

(B) Priorities in Scheduling Criminal Cases. The trial court has the responsibility to establish and control a trial calendar. In assigning cases to the calendar, and insofar as it is practicable,

(1) the trial of criminal cases must be given preference over the trial of civil cases, and

(2) the trial of defendants in custody and of defendants whose pretrial liberty presents unusual risks must be given preference over other criminal cases.

(C) Delay in Felony and Misdemeanor Cases; Recognizance Release. In a felony case in which the defendant has been incarcerated for a period of 180 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, or in a misdemeanor case in which the defendant has been incarcerated for a period of 28 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, the defendant must be released on personal recognizance, **unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community**. In computing the 28-day and 180-day periods, the court is to exclude

(1) periods of delay resulting from other proceedings concerning the defendant, including but not limited to competency and criminal responsibility proceedings, pretrial motions, interlocutory appeals, and the trial of other charges,

(2) the period of delay during which the defendant is not competent to stand trial,

(3) the period of delay resulting from an adjournment requested or consented to by the defendant's lawyer,

(4) the period of delay resulting from an adjournment requested by the prosecutor, but only if the prosecutor demonstrates on the record either

(a) the unavailability, despite the exercise of due diligence, of material evidence that the prosecutor has reasonable cause to believe will be available at a later date; or

(b) exceptional circumstances justifying the need for more time to prepare the state's case,

(5) a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run, but only if good cause exists for not granting the defendant a severance so as to enable trial within the time limits applicable, and

(6) any other periods of delay that in the court's judgment are justified by good cause, but not including delay caused by docket congestion.

(D) Untried Charges Against State Prisoner.

(1) The 180-Day Rule. Except for crimes exempted by MCL 780.131(2), the inmate shall be brought to trial within 180 days ~~either of the following~~:

~~(a) the time from which the prosecutor knows that the person charged with the offense is incarcerated in a state prison or is detained in a local facility awaiting incarceration in a state prison, or~~

~~(b) the time from which the Department of Corrections knows or has reason to know that a criminal charge is pending against a defendant incarcerated in a state prison or detained in a local facility awaiting incarceration in a state prison.~~

~~For purposes of this subrule, a person is charged with a criminal offense if a warrant, complaint, or indictment has been issued against the person.~~

after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of parole eligibility of the prisoner, and any decisions of the parole board

relating to the prisoner. The written notice and statement shall be delivered by certified mail.

(2) Remedy. ~~In cases covered by subrule (1)(a), the defendant is entitled to have the charge dismissed with prejudice if the prosecutor fails to make a good faith effort to bring the charge to trial within the 180-day period. When, in cases covered by subrule (1)(b), the prosecutor's failure to bring the charge to trial is attributable to lack of notice from the Department of Corrections, the defendant is entitled to sentence credit for the period of delay. Whenever the defendant's constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice.~~ **In the event that action is not commenced on the matter for which request for disposition was made as required in subsection (1), no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.**

Committee Comment

Paragraph (C): This "180 day bond rule" is purely a creation of rule, having no statutory counterpart. MCL 765.6 requires that a judge making a bail decision consider, among other things, the "protection of the public" and the "probability or improbability of the person accused appearing at the trial of the cause." Given this statutory requirement, the Committee is of the view that the rule should essentially create a presumption of personal recognizance if the conditions regarding delay are met, but that the presumption can be rebutted by a finding "by clear and convincing evidence that the defendant is likely to fail to appear for future proceedings or to present a danger to any other person or the community." This finding would not result in remand–which is controlled by our constitution–but could overcome the "presumption" of ROR when the conditions are otherwise met.

Paragraph (D): The current rule is difficult to justify. The matter of prompt disposition of pending charges against inmates of correctional institutions is–apart from 6th Amendment speedy trial considerations–a matter of statute, yet the current court rule is inconsistent with the statute. The Committee believes that the rule and the statute should be consistent, and so proposes substitution of the language of the statute–much in the way the pretrial release rule replicates the language of the Michigan Constitution regarding circumstances where remand is permitted–for the current language.

RULE 6.005 RIGHT TO ASSISTANCE OF LAWYER, ADVICE; APPOINTMENT FOR INDIGENTS; WAIVER; JOINT REPRESENTATION; GRAND JURY PROCEEDINGS

(A) Advice of Right. At the arraignment on the warrant or complaint, the court must advise the defendant

(1) of entitlement to a lawyer's assistance at all subsequent court proceedings, and

(2) that the court will appoint a lawyer at public expense if the defendant wants one and is financially unable to retain one.

The court must question the defendant to determine whether the defendant wants a lawyer and, if so, whether the defendant is financially unable to retain one.

(B) Questioning Defendant About Indigency. If the defendant requests a lawyer and claims financial inability to retain one, the court must determine whether the defendant is indigent. The determination of indigency must be guided by the following factors:

(1) present employment, earning capacity and living expenses;

(2) outstanding debts and liabilities, secured and unsecured;

(3) whether the defendant has qualified for and is receiving any form of public assistance;

(4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; and

(5) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel.

The ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer.

(C) Partial Indigency. If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution.

(D) Appointment or Waiver of a Lawyer. If the court determines that the defendant is financially unable to retain a lawyer, it must promptly appoint a lawyer and promptly notify the lawyer of the appointment. The court may

not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

(E) Advice at Subsequent Proceedings. If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,

(1) the defendant must reaffirm that a lawyer's assistance is not wanted; or

(2) if the defendant requests a lawyer and is financially unable to retain one, the court must appoint one; or

(3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one.

The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel.

(F) Multiple Representation. When two or more ~~indigent~~ defendants are jointly charged with an offense or offenses or their cases are otherwise joined, **they may not be represented by the same lawyer or by lawyers associated in the practice of law.**

(~~H~~**G**) Scope of Trial Lawyer's Responsibilities. The responsibilities of the trial lawyer appointed to represent the defendant include

(1) representing the defendant in all trial court proceedings ~~including~~ **through initial** sentencing ~~and proceedings leading to possible revocation of youthful trainee status~~,

(2) filing of interlocutory appeals the lawyer deems appropriate,

(3) responding to any preconviction appeals by the prosecutor,

(4) unless an appellate lawyer has been appointed, filing of **postconviction** motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing.

~~(I) Plan for Appointment. In each county, the court with trial jurisdiction over felony cases **must** adopt and publish a plan to govern the process of selecting and appointing lawyers to represent indigent defendants and file it with the supreme court clerk and the state court administrator under MCR 8.112(B)(3)~~.

(~~J~~H) Assistance of Lawyer at Grand Jury Proceedings.

(1) A witness called before a grand jury or a grand juror is entitled to have a lawyer present in the hearing room while the witness gives testimony. A **witness** may not refuse to appear for reasons of unavailability of the lawyer for that witness. Except as otherwise provided by law, the lawyer may not participate in the proceedings other than to advise the witness.

(2) The prosecutor assisting the grand jury is responsible for ensuring that a witness is informed of the right to a lawyer's assistance during examination by written notice accompanying the subpoena to the witness and by personal advice immediately before the examination. The notice must include language informing the witness that if the witness is financially unable to retain a lawyer, the chief judge in the circuit court in which the grand jury is convened will on request appoint one for the witness at public expense.

Committee Comment

Paragraph (E): The language that "The court may refuse to adjourn a proceeding to appoint counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution and the defendant has not been reasonably diligent in seeking counsel" is proposed to make clear that the judge has discretion to refuse to delay proceedings on a finding

of what amounts to manipulation of the system by the defendant, authority the trial judge likely currently has, but which is not mentioned in the current rules.

Paragraph (F): The current rule prohibits a single appointed counsel from representing multiple defendants in the same case, and the commentary to that rule from the Committee which proposed it indicates that the prohibition was not applied to retained cases because of constitutional concerns ("Because of the legal uncertainties, subrule (B) does not prohibit altogether multiple representation by retained counsel." 422A Mich at 184). *Wheat v United States,* 486 U.S. 153, 163, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) appears to have laid those concerns to rest, and because of conflicts inherent in joint representation no matter what the beliefs of counsel and the defendants at the time–which often results in complaints and allegations post-verdict–the Committee believes a ban is appropriate.

Relettered paragraph (G): For administrative convenience, the Committee believes that the appointment of a lawyer should extend only through initial sentencing, and not include proceedings such as revocation of Youthful Trainee status and the like. Though a judge can certainly reappoint that lawyer for these proceedings, flexibility is given so that a judge can make whatever appointment is efficient and fair at the time without first having to "remove" a lawyer whose responsibilities continue under the current rule.

Current paragraph (I): The Supreme Court has deleted this provision, effective January 1, 2004, in conjunction with an amendment to Rule 8.123 regarding plans for appointment of counsel.

RULE 6.006 VIDEO PROCEEDINGS (New rule)

(A) Defendant at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignment on the warrant, arraignments on the information, pretrials, pleas, sentencing for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations.

(B) Defendant in the Courtroom. So long as the defendant is either present in the courtroom or has waived his or her right to be present, district and circuit courts may use two-way interactive video technology to take testimony from a person at another location in the following proceedings:

(1) preliminary examinations, ~~and~~ evidentiary hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status, and

(2) trials, with the consent of the parties, or where the court determines that so proceeding would not violate the rights of the defendant to confrontation of the witnesses against him or her.

(C) Mechanics of Use. The use of two-way interactive technology must be in accordance with any requirements and guidelines established by the State Court Administrator's office, and all proceedings at which such technology is used must be recorded by the court in the same fashion it records proceedings which occur in the courtroom.

Committee Comment

This new rule was proposed by the Chair, Judge Kolenda, to take advantage of modern technology. Its use at proceedings other than trials is not controversial. Concern was expressed by Committee members regarding use of interactive closed-circuit television at trials in the absence of consent of the parties, particularly because of Confrontation Clause concerns regarding the defendant. The idea of allowing use of contemporaneous closed-circuit testimony "where the court determines that so proceeding is necessary to further an important public policy" was put forward, that term being a term of legal art, taken directly from *Maryland v Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), which uses it as the standard for when some form of testimony other than in-court ("eyeball to eyeball") is permitted. So far only two circumstances have been identified meeting this standard–when the witness would truly be unavailable, such as a witness in the military and in a foreign country–and when it can be demonstrated that "eyeball to eyeball" confrontation would cause harm to the witness. *Maryland v Craig* established that it is not necessary to *cause* this harm or trauma to prove that it would occur–use of an expert is sufficient–but the inquiry must be case-by-case and it must be shown that the witness would be, in effect, traumatized. Other situations may develop that meet the standard. The Committee was concerned, however, that this language does not directly express the constitutional issue involved, and thus determined to instead use language allowing the procedure when "the court determines that so proceeding would not violate the rights of the defendant to confrontation of the witnesses against him or her."

RULE 6.101 THE COMPLAINT

(A) Definition and Form. A complaint is a written accusation that a named or described person has committed a specified criminal offense. The complaint must include the substance of the accusation against the accused and the name and statutory citation of the offense.

(B) Signature and Oath. The complaint must be signed and sworn to before a judicial officer or court clerk.

(C) Prosecutor's Approval or Posting of Security. A complaint may not be filed without a prosecutor's written approval endorsed on the complaint or attached to it, or unless security for costs is filed with the court.

Committee Comment

No change.

RULE 6.102 ARREST ON A WARRANT

(A) Issuance of Warrant. A court must issue an arrest warrant, or a summons in accordance with MCR 6.103, if presented with a proper complaint and if the court finds probable cause to believe that the accused committed the alleged offense.

(B) Probable Cause Determination. A finding of probable cause may be based on hearsay evidence and rely on factual allegations in the complaint, affidavits from the complainant or others, the testimony of a sworn witness adequately preserved to permit review, or any combination of these sources.

(C) Contents of Warrant; Court's Subscription. A warrant must

(1) contain the accused's name, if known, or an identifying name or description;

(2) describe the offense charged in the complaint;

(3) command a peace officer or other person authorized by law to arrest and bring the accused before a judicial officer of the judicial district in which the offense allegedly was committed or some other designated court; and

(4) be signed by the court.

(D) Warrant Specification of Interim Bail. **Where permitted by law, [t]**he court may specify on the warrant the bail that an accused may post to obtain release before arraignment on the warrant and, if the court deems it appropriate, include as a bail condition that the arrest of the accused occur on or before a specified date or within a specified period of time after issuance of the warrant.

(E) Execution and Return of Warrant. Only a peace officer or other person authorized by law may execute an arrest warrant. On execution or attempted execution of the

warrant, the officer must make a return on the warrant and deliver it to the court before which the arrested person is to be taken.

(F) Release on Interim Bail. If an accused has been arrested pursuant to a warrant that includes an interim bail provision, the accused must either be arraigned promptly or released pursuant to the interim bail provision. The accused may obtain release by posting the bail on the warrant and by submitting a recognizance to appear before a specified court at a specified date and time, provided that

(1) the accused is arrested prior to the expiration date, if any, of the bail provision;

(2) the accused is arrested in the county in which the warrant was issued, or in which the accused resides or is employed, and the accused is not wanted on another charge;

(3) the accused is not under the influence of liquor or controlled substance; and

(4) the condition of the accused or the circumstances at the time of arrest do not otherwise suggest a need for judicial review of the original specification of bail.

Committee Comment

Paragraph (E): MCL 780.582a prohibits release on an interim bond under 780.581, but requires the individual be held until arraigned or an interim bond can be set by a judge or magistrate, with regard to certain "domestic violence" cases. Rather than attempting to replicate the statute, which could, of course, be amended, requiring further amendment of the rule, the Committee deems it advisable simply to note that the provision applies "where permitted by law."

RULE 6.103 SUMMONS INSTEAD OF ARREST

(A) Issuance of Summons. If the prosecutor so requests, the court may issue a summons instead of an arrest warrant. If an accused fails to appear in response to a summons, the court, on request, must issue an arrest warrant.

(B) Form. A summons must contain the same information as an arrest warrant, except that it should summon the accused to appear before a designated court at a stated time and place.

(C) Service and Return of Summons. A summons may be served by

(1) delivering a copy to the named individual; or

(2) leaving a copy with a person of suitable age and discretion at the individual's home or usual place of abode; or

(3) mailing a copy to the individual's last known address.

Service should be made promptly to give the accused adequate notice of the appearance date. The person serving the summons must make a return to the court before which the person is summoned to appear.

Committee Comment

No change.

RULE 6.104 ARRAIGNMENT ON THE WARRANT OR COMPLAINT

(A) Arraignment Without Unnecessary Delay. Unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment in accordance with the provisions of this rule, **or must be arraigned without unnecessary delay by use of two-way interactive video technology in accordance with MCR 6.006(A).**

(B) Place of Arraignment. An accused arrested pursuant to a warrant must be taken to a court specified in the warrant. An accused arrested without a warrant must be taken to a court in the judicial district in which the offense allegedly occurred. If the arrest occurs outside the county in which these courts are located, the arresting agency must make arrangements with the authorities in the demanding county to have the accused promptly transported to the latter county for arraignment in accordance with the provisions of this rule. If prompt transportation cannot be arranged, the accused must be taken without unnecessary delay before the nearest available court for preliminary appearance in accordance with subrule (C). **In the alternative, the provisions of this rule may be satisfied by use of two-way interactive video technology in accordance with MCR 6.006(A).**

(C) Preliminary Appearance Outside County of Offense. When, under subrule (B), an accused is taken before a court outside the county of the alleged offense **either in person or by way of two-way interactive video technology**, the court must advise the accused of the rights specified in subrule (E)(2) and determine what form of pretrial release, if any, is appropriate. To be released, the accused must

submit a recognizance for appearance within the next 14 days before a court specified in the arrest warrant or, in a case involving an arrest without a warrant, before either a court in the judicial district in which the offense allegedly occurred or some other court designated by that court. The court must certify the recognizance and have it delivered or sent without delay to the appropriate court. If the accused is not released, the arresting agency must arrange prompt transportation to the judicial district of the offense. In all cases, the arraignment is then to continue under subrule (D), if applicable, and subrule (E) either in the judicial district of the alleged offense or in such court as otherwise is designated.

(D) Arrest Without Warrant. If an accused is arrested without a warrant, a complaint complying with MCR 6.101 must be filed at or before the time of arraignment. On receiving the complaint and on finding probable cause, the court must either issue a warrant or endorse the complaint as provided in MCL 764.1c. Arraignment of the accused may then proceed in accordance with subrule (E).

(E) Arraignment Procedure; Judicial Responsibilities. The court at the arraignment must

(1) inform the accused of the nature of the offense charged, and its maximum possible prison sentence and any mandatory minimum sentence required by law;

(2) if the accused is not represented by a lawyer at the arraignment, advise the accused that

(a) the accused has a right to remain silent,

(b) anything the accused says orally or in writing can be used against the accused in court,

(c) the accused has a right to have a lawyer present during any questioning consented to, and

(d) if the accused does not have the money to hire a lawyer, the court will appoint a lawyer for the accused;

(3) advise the accused of the right to a lawyer at all subsequent court proceedings and, if appropriate, appoint a lawyer;

(4) set a date within the next 14 days for the accused's preliminary examination and inform the accused of the date;

(5) determine what form of pretrial release, if any, is appropriate; and

(6) ensure that the accused has been fingerprinted as required by law.

The court may not question the accused about the alleged offense or request that the accused enter a plea.

(F) Arraignment Procedure; Recording. A verbatim record must be made of the arraignment.

(G) Plan for Judicial Availability. In each county, the court with trial jurisdiction over felony cases must adopt and file with the state court administrator a plan for judicial availability. The plan shall

(1) make a judicial officer available for arraignments each day of the year, or

(2) make a judicial officer available for setting bail for every person arrested for commission of a felony each day of the year conditioned upon

(a) the judicial officer being presented a proper complaint and finding probable cause pursuant to MCR 6.102(A), and

(b) the judicial officer having available information to set bail.

This portion of the plan must provide that the judicial officer shall order the arresting officials to arrange prompt transportation of any accused unable to post bond to the judicial district of the offense for arraignment not later than the next regular business day.

Committee Comment

This rule is unchanged, other than to add language allowing arraignment either in the jurisdiction of the offense or the jurisdiction of arrest by way of video equipment as provided in new MCR 6.006.

RULE 6.106 PRETRIAL RELEASE

(A) In General. At the defendant's first appearance before a court, unless an order in accordance with this rule was issued beforehand, the court must order that, pending trial, the defendant be

(1) held in custody as provided in subrule (B);

(2) released on personal recognizance or an unsecured appearance bond; or

(3) released conditionally, with or without money bail (ten percent, cash or surety).

(B) Pretrial Release/Custody Order Under Const 1963, Art 1, § 15.

(1) The court may deny pretrial release to

(a) a defendant charged with

(i) murder or treason, or

(ii) committing a violent felony and

[A] at the time of the commission of the violent felony, the defendant was on probation, parole, or released pending trial for another violent felony, or

[B] during the 15 years preceding the commission of the violent felony, the defendant had been convicted of 2 or more violent felonies under the laws of this state or substantially similar laws of the United States or another state arising out of separate incidents, if the court finds that proof of the defendant's guilt is evident or the presumption great;

(b) a defendant charged with criminal sexual conduct in the first degree, armed robbery, or kidnapping with the intent to extort money or other valuable thing thereby, if the court finds that proof of the defendant's guilt is evident or the presumption great, unless the court finds by clear and convincing evidence that the defendant is not likely to flee or present a danger to any other person.

(2) A "violent felony" within the meaning of subrule (B)(1) is a felony, an element of which involves a violent act or threat of a violent act against any other person.

(3) If the court determines as provided in subrule (B)(1) that the defendant may not be released, the court must order the defendant held in custody for a period not to exceed 90 days after the date of the order, excluding delays attributable to the defense, within which trial must begin or the court must immediately schedule a hearing and set the amount of bail.

(4) The court must state the reasons for an order of custody on the record and on a form approved by the State Court Administrator's Office entitled "Custody Order." The completed form must be placed in the court file.

(C) Release on Personal Recognizance. If the defendant is not ordered held in custody pursuant to subrule (B), the court must order the pretrial release of the defendant on personal recognizance, or on an unsecured appearance bond, subject to the conditions that the defendant will appear as required, will not leave the state without permission of the court, and will not commit any crime while released, unless the court determines that such release will not reasonably ensure the appearance of the defendant as required, or that such release will present a danger to the public.

(D) Conditional Release. If the court determines that the release described in subrule (C) will not reasonably ensure the appearance of the defendant as required, or will not reasonably ensure the safety of the public, the court may order the pretrial release of the defendant on the condition or combination of conditions that the court determines are appropriate including

(1) that the defendant will appear as required, will not leave the state without permission of the court, and will not commit any crime while released, and

(2) subject to any condition or conditions the court determines are reasonably necessary to ensure the appearance of the defendant as required and the safety of the public, which may include requiring the defendant to

(a) make reports to a court agency as are specified by the court or the agency;

(b) not use alcohol or illicitly use any controlled substance;

(c) participate in a substance abuse testing or monitoring program;

(d) participate in a specified treatment program for any physical or mental condition, including substance abuse;

(e) comply with restrictions on personal associations, place of residence, place of employment, or travel;

(f) surrender driver's license or passport;

(g) comply with a specified curfew;

(h) continue to seek employment;

(i) continue or begin an educational program;

(j) remain in the custody of a responsible member of the community who agrees to monitor the defendant and report any violation of any release condition to the court;

(k) not possess a firearm or other dangerous weapon;

(l) not enter specified premises or areas and not assault, beat, molest or wound a named person or persons;

(m) satisfy any injunctive order made a condition of release; or

(n) comply with any other condition, including the requirement of money bail as described in subrule (E), reasonably necessary to ensure the defendant's appearance as required and the safety of the public.

(E) Money Bail. If the court determines for reasons it states on the record that the defendant's appearance or the protection of the public cannot otherwise be assured, money bail, with or without conditions described in subrule (D), may be required.

(1) The court may require the defendant to

(a) post a bond that, at the defendant's option, is executed

(i) by a surety approved by the court, or

(ii) by the defendant, or by another who is not a licensed surety, and secured by

[A] a cash deposit, or its equivalent, for the full bond amount, or

[B] a cash deposit of 10 percent of the bond amount, or, with the court's consent,

[C] designated real property; or

(b) post a bond that, at the defendant's option, is executed

(i) by a surety approved by the court, or

(ii) by the defendant, or by another who is not a licensed surety, and secured by

[A] a cash deposit, or its equivalent, for the full bond amount, or, with the court's consent,

[B] designated real property.

(2) The court may require satisfactory proof of value and interest in property if the court consents to the posting of a bond secured by designated real property.

(F) Decision; Statement of Reasons.

(1) In deciding which release to use and what terms and conditions to impose, the court is to consider relevant information, including

(a) defendant's prior criminal record, including juvenile offenses;

(b) defendant's record of appearance or nonappearance at court proceedings or flight to avoid prosecution;

(c) defendant's history of substance abuse or addiction;

(d) defendant's mental condition, including character and reputation for dangerousness;

(e) the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence;

(f) defendant's employment status and history and financial history insofar as these factors relate to the ability to post money bail;

(g) the availability of responsible members of the community who would vouch for or monitor the defendant;

(h) facts indicating the defendant's ties to the community, including family ties and relationships, and length of residence, and

(i) any other facts bearing on the risk of nonappearance or danger to the public.

(2) If the court orders the defendant held in custody pursuant to subrule (B) or released on conditions in subrule (D) that include money bail,

the court must state the reasons for its decision on the record. The court need not make a finding on each of the enumerated factors.

(3) Nothing in subrules (C) through (F) may be construed to sanction pretrial detention nor to sanction the determination of pretrial release on the basis of race, religion, gender, economic status, or other impermissible criteria.

(G) Custody Hearing.

(1) Entitlement to Hearing. A court having jurisdiction of a defendant may conduct a custody hearing if the defendant is being held in custody pursuant to subrule (B) **and a custody hearing is requested by either the defendant or the prosecutor** ~~and the defendant requests a custody hearing~~. The purpose of the hearing is to permit the parties to litigate all of the issues relevant to challenging or supporting a custody decision pursuant to subrule (B).

(2) Hearing Procedure.

(a) At the custody hearing, the defendant is entitled to be present and to be represented by a lawyer, and the defendant and the prosecutor are entitled to present witnesses and evidence, to proffer information, and to cross- examine each other's witnesses.

(b) The rules of evidence, except those pertaining to privilege, are not applicable. Unless the court makes the findings required to enter an order under subrule (B)(1), the defendant must be ordered released under subrule (C) or (D). A verbatim record of the hearing must be made.

(H) Appeals; Modification of Release Decision.

(1) Appeals. A party seeking review of a release decision may file a motion in the court having appellate jurisdiction over the court that made the release decision. There is no fee for filing the motion. The reviewing court may not stay, vacate, modify, or reverse the release decision except on finding an abuse of discretion.

(2) Modification of Release Decision.

(a) Prior to Arraignment on the Information. Prior to the defendant's arraignment on the information, any court before which proceedings against the defendant are pending may, on the motion of a party or its own initiative and on finding that there is a substantial reason for doing so, modify a prior release decision or reopen a prior custody hearing.

(b) Arraignment on Information and Afterwards. At the defendant's arraignment on the information and afterwards, the court having jurisdiction of the defendant may, on the motion of a party or its own initiative, make a de novo determination and modify a prior release decision or reopen a prior custody hearing.

(c) Burden of Going Forward. The party seeking modification of a release decision has the burden of going forward.

(3) Emergency Release. If a defendant being held in pretrial custody under this rule is ordered released from custody as a result of a court order or law requiring the release of prisoners to relieve jail conditions, the court ordering the defendant's release may, if appropriate, impose conditions of release in accordance with this rule to ensure the appearance of the defendant as required and to protect the public. If such conditions of release are imposed, the court must inform the defendant of the conditions on the record or by furnishing to the defendant or the defendant's lawyer a copy of the release order setting forth the conditions.

(I) Termination of Release Order.

(1) If the conditions of the release order are met and the defendant is discharged from all obligations in the case, the court must vacate the release order, discharge anyone who has posted bond, and return the cash (or its equivalent) posted in the full amount of a bond, or, if there has been a deposit of 10 percent of the bond amount, return 90 percent of the deposited money and retain 10 percent.

(2) If the defendant has failed to comply with the conditions of release, the court may issue a warrant for the arrest of the defendant and enter an order revoking the release order and declaring the bail money deposited or the surety bond, if any, forfeited.

(a) The court must mail notice of any revocation order immediately to the defendant at the defendant's last known address and, if forfeiture of bond has been ordered, to anyone who posted bond.

(b) If the defendant does not appear and surrender to the court within 28 days after the revocation date or does not within the period satisfy the court that there was compliance with the conditions of release or that compliance was impossible through no fault of the defendant, the court may continue the revocation order and enter judgment for the state or local unit of government against the defendant and anyone who posted bond for the entire amount of the bond and costs of the court proceedings.

(c) The 10 percent bond deposit made under subrule (E)(1)(a)(ii)[B] must be applied to the costs and, if any remains, to the balance of the judgment. The amount applied to the judgment must be transferred to the county treasury for a circuit court or recorder's court case, to the treasuries of the governments contributing to the district control unit for a district court case, or to the treasury of the appropriate municipal government for a municipal court case. The balance of the judgment may be enforced and collected as a judgment entered in a civil case.

(3) If money was deposited on a bond executed by the defendant, the money must be first applied to the amount of any fine, costs, or statutory assessments imposed and any balance returned, subject to subrule (I)(1).

Committee Comment

The pretrial release rule was amended after the report of a special Committee appointed by the Michigan Supreme Court some years ago, and the Committee was reluctant to again revise it

substantially. The only change is in paragraph (G), where a revision is made so it is clear that the prosecutor may also request a custody hearing.

RULE 6.107 GRAND JURY PROCEEDINGS

(A) Right to Grand Jury Records. Whenever an indictment is returned by a grand jury or a grand juror, the person accused in the indictment is entitled to the part of the record, including a transcript of the part of the testimony of all witnesses appearing before the grand jury or grand juror, that touches on the guilt or innocence of the accused of the charge contained in the indictment.

(B) Procedure to Obtain Records.

(1) To obtain the part of the record and transcripts specified in subrule (A), a motion must be addressed to the chief judge of the circuit court in the county in which the grand jury issuing the indictment was convened~~, or, if the grand jury convened on the order of the Recorder's Court for the City of Detroit, then to the chief judge of that court~~.

(2) The motion must be filed within 14 days after arraignment on the indictment or at a reasonable time thereafter as the court may permit on a showing of good cause and a finding that the interests of justice will be served.

(3) On receipt of the motion, the chief judge shall order the entire record and transcript of testimony taken before the grand jury to be delivered to him or her by the person having custody of it for an in camera inspection by the chief judge.

(4) Following the in camera inspection, the chief judge shall certify the parts of the record, including the testimony of all grand jury witnesses that touches on the guilt or innocence of the accused, as being all of the evidence bearing on that issue contained in the record, and have two copies of it prepared, one to be delivered to the attorney for the accused, or to the accused if not represented by an attorney, and one to the attorney charged with the responsibility for prosecuting the indictment.

(5) The chief judge shall then have the record and transcript of all testimony of grand jury witnesses returned to the person from whom

it was received for disposition according to law.

Committee Comment

No change, other than recognition that Detroit Recorder's Court no longer exists.

RULE 6.110 THE PRELIMINARY EXAMINATION

(A) Right to Preliminary Examination. **Where a preliminary examination is permitted by law, ~~T~~the** people and the defendant are entitled to a prompt preliminary examination. If the court permits the defendant to waive the preliminary examination, it must bind the defendant over for trial on the charge set forth in the complaint ~~or indictment~~ **or any amended complaint**.

(B) Time of Examination; Remedy.

~~(1)~~ Unless adjourned by the court, the preliminary examination must be held on the date specified by the court at the arraignment on the warrant or complaint. **If the parties consent, the court may adjourn the preliminary examination for a reasonable time. If a party objects, ~~T~~t**he court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment. **A violation of this subrule is deemed to be harmless error unless the defendant demonstrates actual prejudice.**

~~(2) The issues whether the preliminary examination was timely held or the requisite record showing for delay was made must be raised, if at all, in a written or oral motion no later than immediately before the commencement of the preliminary examination. To challenge the denial of a timely motion, the defendant must before the trial either file a timely application for leave to appeal with the trial court or, within 21 days after the filing of the information in the trial court, file a motion to dismiss in the trial court. If relief is denied by the trial court, a defendant who wishes to obtain further review must file a timely application with the Court of Appeals, and, if relief is denied by the Court of Appeals, a further timely application with the Supreme Court. A defendant may not after conviction seek relief on the basis of a violation of subrule (B)(1).~~

(C) Conduct of Examination. Each party may subpoena witnesses, offer proofs, and examine and cross-examine witnesses at the preliminary examination. ~~Except as otherwise provided by law, the court must conduct the examination in accordance with the rules of evidence~~. A verbatim record must be made of the preliminary examination.

(D) Exclusionary Rules. **Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination.** ~~If, during the~~ preliminary ~~examination, the court determines that evidence being offered is excludable, it must, on motion or objection, exclude the evidence.~~ ~~If, however, there has been a preliminary showing that the evidence is admissible, the court need not hold a separate evidentiary hearing on the question of whether the evidence should be excluded. The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court on the basis of~~

~~(1) a prior evidentiary hearing, or~~

~~(2) a prior evidentiary hearing supplemented with a hearing before the trial court, or~~

~~(3) if there was no prior evidentiary hearing, a new evidentiary hearing.~~

(E) Probable Cause Finding. If, after considering the evidence, the court determines that probable cause exists to believe both that an offense not cognizable by the district court has been committed and that the defendant committed it, the court must bind the defendant over for trial. If the court finds probable cause to believe that the defendant has committed an offense cognizable by the district court, it must proceed thereafter as if the defendant initially had been charged with that offense.

(F) Discharge of Defendant. If, after considering the evidence, the court determines that probable cause does not exist to believe either that an offense has been committed or that the defendant committed it, the court must discharge the defendant without prejudice to the prosecutor initiating a subsequent prosecution for the same offense. Except as provided in MCR 8.111(C), the subsequent preliminary examination must be held before the same judicial officer and the prosecutor must present additional evidence to support the charge.

(G) Return of Examination. Immediately on concluding the examination, the court must certify and transmit to the court before which the defendant is bound to appear the prosecutor's authorization for a warrant application, the complaint, a

copy of the register of actions, the examination return, and any recognizances received.

(H) Motion to Dismiss. If, on proper motion, the trial court finds a violation of subrule (C), (D), (E), or (F), it must either dismiss the information or remand the case to the district court for further proceedings.

(I) Scheduling the Arraignment. Unless the trial court does the scheduling of the arraignment on the information, the district court must do so in accordance with the administrative orders of the trial court.

Committee Comment

Paragraph (A). Language is added to make clear that an examination is not always required under law (e.g. after a grand jury indictment).

Paragraph (B). The current rule allows adjournment of the examination only on good cause, making no provision for consent of the parties. Though no party would be aggrieved and could gain relief from an adjournment after consent, it seems the rule should simply recognize the point. The proposal would reinstate the provision from proposal by the original Committee that a timing error is harmless absent some showing of prejudice. As Professor Grano noted then, the remedy for delay should be to end the delay and hold the examination. Requiring dismissal without prejudice, resulting in a reissuance, a new arraignment, and a new preliminary examination date (14 days after arraignment) as a remedy for delay makes no sense. The remedy for delay should not be more delay.

Paragraph (C). The rules of evidence themselves list the proceedings to which they apply in MRE 1101. The Committee first thought of amending the current language to take account of the recent amendment of MRE 1101(8), but proposes instead leaving reference of the proceedings to which the rules of evidence apply to MRE 1101.

Paragraph (D). It would seem that the answer to the question of whether questions regarding the acquisition of evidence can be raised at the examination, at least by way of a hearing, should be answered either "yes" or "no," but the current rule answers "maybe," the point simply being left to each individual magistrate to decide at each individual examination. The overwhelming practice in the country is not to allow litigation of question of the acquisition of evidence at the examination, particularly since, if a bindover occurs, the decision by the magistrate becomes pointless, as it does not bind the trial court, and thus there is duplication of effort. Further, the prosecutor generally is not prepared at the preliminary examination to conduct full-blown suppression hearings. Most jurisdictions do not consider the manner of the acquisition of the evidence at the preliminary examination. See e.g SDCL (South Dakota) 23A-4-6: "The rules of evidence shall apply, except that an objection to evidence on the ground that it was acquired by unlawful means is not properly made at the preliminary hearing. Motions to suppress such evidence must be made to the trial court"; *State v. Smith,* 678 N.E.2d 1006, (Ohio App. 6

Dist.,1996): “Crim.R. 19(B)(1) does not give a magistrate authority to preside over a motion to suppress evidence”; ,FRCP 5.1: "[o]bjections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12." The Committee concluded that a bright-line rule is preferable, and that Michigan should join the overwhelming majority of jurisdictions that preclude consideration at the preliminary examination of questions of the manner of the acquisition of evidence.

RULE 6.111 PLEAS OF GUILTY OR NOLO CONTENDERE AT PRELIMINARY EXAMINATION (new rule)

(A) If the defendant, the defense attorney, and the prosecutor consent on the record, a plea of guilty or nolo contendere may be taken in criminal cases recognizable in the circuit court by a district judge after bindover immediately following the conclusion or waiver of a preliminary examination. Following a plea, the case shall be transferred to the court with trial jurisdiction over the case.

(B) Pleas taken pursuant to this rule shall be taken in conformity with MCR 6.301 and 6.302, and, once taken, shall be governed by MCR 6.310 and 6.311.

(C) Each court intending to utilize this rule shall submit a Local Administrative Order to the State Court Administrator pursuant to MCR MCR 8.112(B) to implement the rule.

Committee Comment

This rule allows pleas in felonies to be taken in the district court, with sentencing to occur in circuit court. No circuit is required to employ this practice, and a local administrative order is required to implement it. This rule is not “new” in the sense that it simply puts in rule what is now allowed by Administrative Order.

RULE 6.112 THE INFORMATION OR INDICTMENT

(A) Informations and Indictments; Similar Treatment. Except as otherwise provided in these rules or elsewhere, the law and rules that apply to informations and prosecutions on informations apply to indictments and prosecutions on indictments.

(B) Use of Information or Indictment. A prosecution must be based on an information or an indictment. Unless the defendant is a fugitive from justice, the prosecutor may not file an information until the defendant has had or waives a preliminary examination. An indictment is returned and filed without preliminary examination.

When this occurs, the indictment may substitute for the complaint and commence judicial proceedings.

(C) Time of Filing Information or Indictment. The prosecutor must file the information or indictment on or before the date set for the arraignment.

(D) Information; Nature and Contents; Attachments. The information must set forth the substance of the accusation against the defendant and the name, statutory citation, and penalty of the offense allegedly committed. If applicable, the information must also set forth the notice required by MCL 767.45, and the defendant's Michigan driver's license number. To the extent possible, the information should specify the time and place of the alleged offense. Allegations relating to conduct, the method of committing the offense, mental state, and the consequences of conduct may be stated in the alternative. A list must be attached to the information of all witnesses known to the prosecutor who might be called at trial and all res gestae witnesses known to the prosecutor or investigating law enforcement officers. A prosecutor must sign the information.

(E) Bill of Particulars. The court, on motion, may order the prosecutor to provide the defendant a bill of particulars describing the essential facts of the alleged offense.

(F) Notice of Intent to Seek Enhanced Sentence. A notice of intent to seek an enhanced sentence pursuant to MCL 769.13 must list the prior convictions that may be relied upon for purposes of sentence enhancement. The notice must be filed ~~within 21 days after the defendant is arraigned or has waived arraignment on the information charging the underlying felony, or before trial begins, if the defendant is tried within the 21-day period~~ **within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.**

(G) Harmless Error. Absent a timely objection and a showing of prejudice, a court may not dismiss an information or reverse a conviction because of an untimely filing or because of an incorrectly cited statute or a variance between the information and proof regarding time, place, the manner in which the offense was committed, or other factual detail relating to the alleged offense. This provision does not apply to the untimely filing of a notice of intent to seek an enhanced sentence.

(H) Amendment of Information. The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant. On motion, the court must strike unnecessary allegations from the information.

Committee Comment

Paragraph (F). The only change here is to substitute the actual statutory language regarding the filing of notice under the habitual statute, as the current rule is slightly at odds with the statute (and the matter is statutory).

RULE 6.113 THE ARRAIGNMENT ON THE INDICTMENT OR INFORMATION

(A) Time of Conducting. Unless the defendant waives arraignment or the court for good cause orders a delay, **or as otherwise permitted by these rules,** the court with trial jurisdiction must arraign the defendant on the scheduled date. The court may hold the arraignment before the preliminary examination transcript has been prepared and filed. Unless the defendant demonstrates actual prejudice, failure to hold the arraignment on the scheduled date is to be deemed harmless error.

(B) Arraignment Procedure. The prosecutor must give a copy of the information to the defendant before the defendant is asked to plead. Unless waived by the defendant, the court must either state to the defendant the substance of the charge contained in the information or require the information to be read to the defendant. If the defendant has waived legal representation, the court must advise the defendant of the pleading options. If the defendant offers a plea other than not guilty, the court must proceed in accordance with the rules in subchapter 6.300. Otherwise, the court must enter a plea of not guilty on the record. A verbatim record must be made of the arraignment.

(C) Waiver. A defendant represented by a lawyer may, as a matter of right, enter a plea of not guilty or stand mute without arraignment by filing, at or before the time set for the arraignment, a written statement signed by the defendant and the defendant's lawyer acknowledging that the defendant has received a copy of the information, has read or had it read or explained, understands the substance of the charge, waives arraignment in open court, and pleads not guilty to the charge or stands mute.

~~(D) Preliminary Examination Transcript. Unless the defendant pleads guilty at the~~ arraignment ~~or the parties otherwise agree, the court must order the court reporter to transcribe and file the record of the preliminary examination. The order must also provide for the payment of the reporter's fees.~~

(D) Elimination of Arraignments. A circuit court may submit to the State Court Administrator ~~pursuant~~ **to MCR 8.112(B) a local Administrative Order which**

eliminates arraignments for defendants represented by an attorney, provided other arrangements are made to give the defendant a copy of the information.

Committee Comment

Paragraph (A) and (D). The language "or as otherwise provided by law" is added to (A) take account of proposed (D), which would allow a circuit court, through an administrative order approved by the State Court Administrator, to eliminate arraignments on the information.

Current (D). Current (D) is eliminated. The requirement that the preliminary examination be filed in *every* case means that preliminary examinations are prepared–and paid for–in a vast number of cases that result in guilty pleas without any motion to quash, or need for one. The preparation of the transcript should not be automatic, then.

RULE 6.120 JOINDER AND SEVERANCE; SINGLE DEFENDANT

(A) Permissive Joinder. An information or indictment may charge a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.

(B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on

(1) the same conduct, or

(2) a series of connected acts or acts constituting part of a single scheme or plan.

(C) Other Joinder or Severance. On the motion of either party, except as to offenses severed under subrule (B), the court may join or sever offenses on the ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. Subject to an objection by either party, the court may sever offenses on its own initiative.

Committee Comment

No change. The Committee is unaware of any difficulties with the current rule.

RULE 6.121 JOINDER AND SEVERANCE; MULTIPLE DEFENDANTS

(A) Permissive Joinder. An information or indictment may charge two or more defendants with the same offense. It may charge two or more defendants with two or more offenses when

(1) each defendant is charged with accountability for each offense, or

(2) the offenses are related as defined in MCR 6.120(B).

When more than one offense is alleged, each offense must be stated in a separate count. Two or more informations or indictments against different defendants may be consolidated for a single trial whenever the defendants could be charged in the same information or indictment under this rule.

(B) Right of Severance; Unrelated Offenses. On a defendant's motion, the court must sever offenses that are not related as defined in MCR 6.120(B).

(C) Right of Severance; Related Offenses. On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.

(D) Discretionary Severance. On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial.

Committee Comment

No change. The Committee is unaware of any difficulties with the current rule.

RULE 6.125 MENTAL COMPETENCY HEARING

(A) Applicable Provisions. Except as provided in these rules, a mental competency hearing in a criminal case is governed by MCL 330.2020 et seq.

(B) Time and Form of Motion. The issue of the defendant's competence to stand trial or to participate in other criminal proceedings may be raised at any time during the proceedings against the defendant. The issue may be raised by the court before which such proceedings are pending or being held, or by motion of a party. Unless the issue of defendant's competence arises during the course of proceedings, a motion raising the issue of defendant's competence must be in writing. If the competency issue arises during the course of proceedings, the court may adjourn the proceeding or, if the proceeding is defendant's trial, the court may, consonant with double jeopardy considerations, declare a mistrial.

(C) Order for Examination.

(1) On a showing that the defendant may be incompetent to stand trial, the court must order the defendant to undergo an examination by a certified or licensed examiner of the center for forensic psychiatry or other facility officially certified by the department of mental health to perform examinations relating to the issue of competence to stand trial.

(2) The defendant must appear for the examination as required by the court.

(3) If the defendant is held in detention pending trial, the examination may be performed in the place of detention or the defendant may be transported by the sheriff to the diagnostic facility for examination.

(4) The court may order commitment to a diagnostic facility for examination if the defendant fails to appear for the examination as required or if commitment is necessary for the performance of the examination.

(5) The defendant must be released from the facility on completion of the examination and, if (3) is applicable, returned to the place of detention.

(D) Independent Examination. On a showing of good cause by either party, the court may order an independent examination of the defendant relating to the issue of competence to stand trial.

(E) Hearing. A competency hearing must be held within 5 days of receipt of the report required by MCL 330.2028 or on conclusion of the proceedings then before the court, whichever is sooner, unless the court, on a showing of good cause, grants an adjournment.

(F) Motions; Testimony.

(1) A motion made while a defendant is incompetent to stand trial must be heard and decided if the presence of the defendant is not essential for a fair hearing and decision on the motion.

(2) Testimony may be presented on a pretrial defense motion if the defendant's presence could not assist the defense.

Committee Comment

No change. The Committee is unaware of any difficulties with the current rule.

RULE 6.201 DISCOVERY

(A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:

(1) the names and addresses of all lay and expert witnesses whom the party ~~intends to~~ **may** call at trial; **in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview. The witness list may be amended without leave of the court no later than 28 days before trial.**

(2) any written or recorded statement **pertaining to the case** by a lay witness **whom** the party ~~intends to~~ **may** call at trial, except that a defendant is not obliged to provide the defendant's own statement;

(3) **if a party may call an expert, a curriculum vitae and either a report by the expert, or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion;**
~~any report of any kind produced by or for an~~ **from any** ~~expert witness whom the party intends to call at trial;~~

(4) any criminal record that the party ~~intends to~~ **may** use at trial to impeach a witness;

~~(5) any document, photograph, or other paper that the party intends to introduce at trial;~~ and

(~~6~~**5)** a description of and an opportunity to inspect any tangible physical evidence that the party ~~intends to~~ **may** i**ntroduce** at trial**, including any document, photograph, or other paper, copies to be provided on request**. **A party may request a hearing regarding any question of costs of reproduction.** On good cause shown, the court may order that a party be given the opportunity to test without destruction **any** ~~such~~ tangible physical evidence.

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report concerning the case~~, except so much of a report as concerns a continuing investigation~~;

(3) any written or recorded statements by a defendant, codefendant, or ~~accomplice~~ **pertaining to the case**, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in ~~connection~~ with the case; and

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

(C) Prohibited Discovery.

(1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in subrule (2).

(2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in-camera inspection of the records.

(a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in-camera inspection, the trial court shall suppress or strike the privilege holder's testimony.

(b) If the court is satisfied, following an in-camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the trial court shall suppress or strike the privilege holder's testimony.

(c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.

(d) The court shall seal and preserve the records for review in the event of an appeal.

(i) by the defendant, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense, or

(ii) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.

(e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide.

(D) Excision. When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court must conduct a

hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal.

(E) Protective Orders. On motion and a showing of good cause, the court may enter an appropriate protective order. In considering whether good cause exists, the court shall consider the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, **embarrassment**, or threats; the risk that evidence will be fabricated; and the need for secrecy regarding the identity of informants or other law enforcement matters. On motion, with notice to the other party, the court may permit the showing of good cause for a protective order to be made in camera. If the court grants a protective order, it must seal and preserve the record of the hearing for review in the event of an appeal.

(F) Timing of Discovery. Unless otherwise ordered by the court, the prosecuting attorney must comply with the requirements of this rule within ~~7~~ **21** days of a request under this rule and a defendant must comply with the requirements of this rule within ~~14~~ **21** days of a request under this rule.

(G) Copies. Except as ordered by the court on good cause shown, a party's obligation to provide a photograph or paper of any kind is satisfied by providing a clear copy.

(H) Continuing Duty to Disclose. If at any time a party discovers additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party.

(I) Modification. On good cause shown, the court may order a modification of the requirements and prohibitions of this rule.

(J) Violation. If a party fails to comply with this rule, the court, in its discretion, may order ~~that testimony or evidence be excluded, or may order another remedy.~~ **the party to provide the** discovery **or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion.**

Committee Comment

Generally: The Supreme Court in Administrative Order 1994-10 declared that discovery in criminal cases is governed by MCR 6.210 and not MCL 767.94a. Recently, the Court ordered the parties to brief the following issue in a criminal case on which leave was granted: "whether the court rule, MCR 6.201, or the statute, MCL 767.94a, controls discovery in a criminal case...." *People v. Phillips,* 649 NW2d 73 (2002). Resolution of this question is beyond the scope of the Committee's work, and the Committee has proceeded on the assumption that Administrative Order 1994-10 declares the current state of things.

Paragraph (A)(1): Because of concerns of witnesses regarding their addresses becoming known to persons who might be unhappy regarding their testimony or possible testimony, the proposed amendment provides a party with the alternative of supplying the witness's name and making the witness available for interview. The Committee is also of the opinion that flexibility in amending a witness list should be provided without leave of the court so long as the amendment is at least 28 days prior to trial.

Paragraph (A)(1)(2)(4)(5): The Committee was concerned that the current language requiring disclosure when a party "intends to" call certain witnesses or present certain evidence leaves a wide loophole, allowing attorneys to argue that they do not necessarily know *who* they "intend" to call, or what physical evidence they "intend" to present, until they see how the trial plays out, allowing avoidance of the requirements of the rule. Though there is no solution that completely solves this problem, the Committee believes that use of the term "may" rather than "intends to" connotes, at least, that a party is to err on the side of disclosure rather than nondisclosure.

Paragraph (A)(2): Language is added to make clear that the requirement to disclose any written or recorded statement by a lay witness refers to one "pertaining to the case."

Paragraph (A)(3): On occasion a party attempts to call an expert without providing a report from that expert to the opposing party, defending the practice on the basis that the expert prepared no written report, so that there is no report to disclose. Currently the Supreme Court is considering whether a trial court has authority under paragraph (I) to direct the party to provide a written report, that paragraph granting a trial judge authority to "order a modification of the requirements and prohibitions of this rule." The court, in fact, directed that certain issues be briefed, including:

> (1) whether MCR 6.201 or MCL 767.94a allows a trial court to compel creation of a report from a proposed defense expert witness; (2) whether the court rules authorize a trial court to compel disclosure of a defense; (3) whether the court rule, MCR 6.201, or the statute, MCL 767.94a, controls discovery in a criminal case; and (4) whether MRE 705 gives the trial court discretion to order disclosure of a defense expert's opinion.
>
> *People v. Phillips,* 649 NW2d 73 (2002)

The Committee cannot speak to whether the statute or court rule controls the discovery process; the court having previously said that the rule controls, the Committee determined to add

language to the rule that would require either a report, or a substitute for a report in the nature of a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion, those requirements existing in the rules of other jurisdictions. See e.g. Ak RCP 16.

Paragraph (A)(5)(6): For the purpose of efficiency the Committee determined to combine the two paragraphs, and to make mandatory provision of copies of documents and photos and the like turn on a specific request after examination of them (of course, a party is free to turn them over on request without examination of them). Further, any dispute on costs of reproduction should be taken to the trial court.

Paragraph (B)(2): The language that on request the prosecution should turn over any police report concerning the case "except so much of a report as concerns a continuing investigation" was modified by deleting the exception. The Committee is of the view that the matter is better handled by application for a protective order under paragraph E.

Paragraph (E): In addition to the grounds for a protective order, the Committee added "embarrassment." This does not mean that the trial court should enter a protective order whenever a witness might be embarrassed, but only that embarrassment is a possible ground for a finding of good cause. This ground is contained in FRCP 26(c). With regard to disclosure and nondisclosure of search warrant affidavits, the matter is covered by MCL 780.651.

Paragraph (F): The Committee believes that the timing requirements for discovery compliance are currently onerous, and proposes giving each side 21 days after request is made to comply.

Paragraph (J): One of the Committee's primary concerns was to provide more specificity with regard to sanctions for discovery violations, while at the same time making clear that draconian sanctions are to be reserved for egregious cases. Language is thus added pointing out possible alternative actions that the trial court may take. The Committee strongly feels the trial judge must be given some leeway in handling the situation, and thus includes language that review of the trial court's action is limited to abuse of discretion.

RULE 6.301 AVAILABLE PLEAS

(A) Possible Pleas. Subject to the rules in this subchapter, a defendant may plead not guilty, guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. If the defendant refuses to plead or stands mute, or the court, pursuant to the rules, refuses to accept the defendant's plea, the court must enter a not guilty plea on the record. A plea of not guilty places in issue every material allegation in the information and permits the defendant to raise any defense not otherwise waived.

(B) Pleas That Require the Court's Consent. A defendant may enter a plea of nolo contendere only with the consent of the court.

(C) Pleas That Require the Consent of the Court and the Prosecutor. A defendant may enter the following pleas only with the consent of the court and the prosecutor:

(1) A defendant who has asserted an insanity defense may enter a plea of guilty but mentally ill or a plea of not guilty by reason of insanity. Before such a plea may be entered, the defendant must comply with the examination required by law.

(2) A defendant may enter a conditional plea of guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. A conditional plea preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. The ruling or rulings as to which the defendant reserves the right to appeal must be specified orally on the record or in a writing made a part of the record. The appeal is by application for leave to appeal only.

(D) Pleas to Lesser Charges. The court may not accept a plea to an offense other than the one charged without the consent of the prosecutor.

Committee Comment

No change.

RULE 6.302 PLEAS OF GUILTY AND NOLO CONTENDERE

(A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant under oath and personally carry out subrules (B)-(E).

(B) An Understanding Plea. Speaking directly to the defendant**(s)**, the court must advise the defendant**(s)** and determine that the defendant**(s)** understands:

(1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;

(2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law;

(3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:

(a) to be tried by a jury;

~~(b) to be tried by the court without a jury, if the defendant chooses and the prosecutor and court consent;~~

(~~c~~**b)** to be presumed innocent until proved guilty;

(~~d~~**c)** to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty;

(~~e~~**d**) to have the witnesses against the defendant appear at the trial;

(~~f~~**e)** to question the witnesses against the defendant;

(~~g~~**f)** to have the court order any witnesses the defendant has for the defense to appear at the trial;

(~~h~~**g)** to remain silent during the trial;

(~~i~~**h)** to not have that silence used against the defendant; and

(~~j~~**i)** to testify at the trial if the defendant wants to testify.

The requirements of this section may be satisfied by a writing on a form approved by the State Court Administrator. If a court uses a writing, the court shall address the defendant and obtain from him or her orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea and;

(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right**, and defendant will not necessarily have counsel appointed to prepare the application.**

~~(6) if the plea is accepted, the defendant is not entitled to have counsel appointed at public expense to assist in filing an application for leave to appeal or to assist with other postconviction remedies unless the defendant is financially unable to retain counsel and~~

~~(a) the defendant's sentence exceeds the guidelines,~~

~~(b) the plea is a conditional plea under MCR 6.301(C)(2),~~

~~(c) the prosecuting attorney seeks leave to appeal, or~~

~~(d) the Court of Appeals or the Supreme Court grants leave to appeal.~~

(C) A Voluntary Plea.

(1) The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement.

(2) If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant.

(3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may

(a) reject the agreement; or

(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to or recommended by the prosecutor; or

(c) accept the agreement without having considered the presentence report; or

(d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the

sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement.

(4) The court must ask the defendant:

(a) (if there is no plea agreement) whether anyone has promised the defendant anything, or (if there is a plea agreement) whether anyone has promised anything beyond what is in the plea agreement;

(b) whether anyone has threatened the defendant; and

(c) whether it is the defendant's own choice to plead guilty.

(D) An Accurate Plea.

(1) If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

(2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:

(a) state why a plea of nolo contendere is appropriate; and

(b) hold a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

(E) Additional Inquiries. On completing the colloquy with the defendant, the court must ask the prosecutor and the defendant's lawyer whether either is aware of any promises, threats, or inducements other than those already disclosed on the record, and whether the court has complied with subrules (B)- (D). If it appears to the court that it has failed to comply with subrules (B)-(D), the court may not accept the defendant's plea until the deficiency is corrected.

(F) Plea Under Advisement; Plea Record. The court may take the plea under advisement. A verbatim record must be made of the plea proceeding.

Committee Comment

Paragraph (B): While the Committee believes that "speaking directly" to the defendant does not mean speaking "solely" or only to one defendant, so that plea advice may be given to more than one pleading defendant at a time, adding (s) after "defendant" makes the point clear. While each defendant will be engaged individually regarding the offense, sentence possibilities, plea bargain, and so on, the advice of rights portion of the rule can be given to more than one defendant at a time. Indeed, giving the rights once to, for example, 5 defendants, will lead to a more patient and perhaps thorough explanation than a requirement that the judge go through the rights 5 separate times. The proposed amendment also includes a provision allowing the waiver of rights to occur in a writing on a form approved by the State Court Administrator, if a particular court chooses to take advantage of that opportunity.

Paragraph (B)(3)(b): The proposal deletes from the advice of "rights" the possibility of a bench trial, because it is not a right, but a possibility, requiring the consent of two other entities (the court and the prosecution). The defendant is not waiving a "right" to bench trial by pleading guilty.

Paragraph (B)(6): The Committee believes that section does not belong in advice to the defendant; defendant is entitled to counsel to prepare an application under certain conditions, and the court will advise defendant at sentencing whether the defendant is entitled to appointed counsel so as to be able to make the appropriate request.

RULE 6.303 PLEA OF GUILTY BUT MENTALLY ILL

Before accepting a plea of guilty but mentally ill, the court must comply with the requirements of MCR 6.302. In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or (D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill~~, but not insane,~~ at the time of the offense to which the plea is entered. The reports must be made a part of the record.

Committee Comment

The only change is to delete "but not insane." Given the shift in burden of proof on insanity to the defendant, the court need not "find" defendant is "not" insane in order to take a GBMI plea.

RULE 6.304 PLEA OF NOT GUILTY BY REASON OF INSANITY

(A) Advice to Defendant. Before accepting a plea of not guilty by reason of insanity, the court must comply with the requirements of MCR 6.302 except that subrule (C) of this rule, rather than MCR 6.302(D), governs the manner of determining the accuracy of the plea.

(B) Additional Advice Required. After complying with the applicable requirements of MCR 6.302, the court must advise the defendant, and determine whether the defendant understands, that the plea will result in the defendant's commitment for diagnostic examination at the center of forensic psychiatry for up to 60 days, and that after the examination, the probate court may order the defendant to be committed for an indefinite period of time.

(C) Factual Basis. Before accepting a plea of not guilty by reason of insanity, the court must examine the psychiatric reports prepared and hold a hearing that establishes support for findings that

(1) the defendant committed the acts charged, and

(2) ~~a reasonable doubt exists about the defendant's legal sanity at the time of the offense.~~ **that, by a preponderance of the evidence, the defendant was legally insane at the time of the offense.**

(D) Report of Plea. After accepting the defendant's plea, the court must forward to the center for forensic psychiatry a full report, in the form of a settled record, of the facts concerning the crime to which the defendant pleaded and the defendant's mental state at the time of the crime.

Committee Comment

Again, given the shift in burden of proof on insanity, the court needs to determine that defendant was legally insane by a preponderance of the evidence, rather than entertain a reasonable doubt as to sanity, where the plea is NGRI.

RULE 6.310 WITHDRAWAL OR VACATION OF PLEA ~~BEFORE ACCEPTANCE OR SENTENCE~~

(A) Withdrawal Before Acceptance. The defendant has a right to withdraw any plea until the court accepts it on the record.

(B) Withdrawal **After Acceptance But** Before Sentence. **After acceptance but before** sentence**,**

(1) **a plea may be withdrawn** [o]n the defendant's motion or with the defendant's consent **only** ~~, the court~~ in the interest of justice, ~~may permit an accepted plea to be withdrawn before sentence is imposed unless~~ **and may not be withdrawn if** withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the

plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by ~~MCR 6.311(B)~~ **paragraph (C).**

(2) the defendant is entitled to withdraw the plea if
(a) the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea;
(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.

(C) Motion to Withdraw Plea After Sentence. The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.

(D) Preservation of Issues. A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

(E) Vacation of Plea On Prosecutor's Motion. On the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement.

Committee Comment

Generally: The Committee determined that it makes sense to merge current rules 6.311 and 6.312 into one rule concerning the withdrawal of pleas.

Paragraph (B): There are principles regarding plea withdrawal governed by case law — *Killebrew*, and *Cobbs/Williams*— but not covered by rule. The proposed amendment would incorporate those principles in (B)(2). It is also proposed that (B)(1) be modified slightly, only as a point of emphasis, to provide that a plea may be withdrawn "only" in the interest of justice. There are also principles covered by case law concerning that which is to occur when the claim is raised on a motion to withdraw plea, or on appeal of a plea, that the factual basis for the plea is inadequate. In *Guilty Plea Cases,* 395 Mich 96, 129 (1975) the Court held that in the circumstance the prosecution is to be given the opportunity to establish the missing element. If the prosecution establishes the missing element, but contrary evidence is also adduced, the trial court was to treat the matter as a motion to withdraw the plea. The Committee concluded that including this case law in the rule was inadvisable. But though it seems that, in practice, trial courts do not apply the rules of evidence to the prosecution's supplementation of the record, the Committee recommends that Rule 1101(b)(3) be amended to make this clear.

Paragraph (C): The Committee is of the view that one year is an overly generous time to allow plea withdrawal, but that limiting withdrawal to the time for a timely appeal is too short. The Committee proposes a 6 month time limitation. The rule refers to an "error in the plea proceeding that would *entitle* the defendant to have the plea set aside." Not every error in the plea colloquy is one that "entitles" the defendant to withdraw the plea; that entitlement arises only from such errors, for example, as a failure to advise appropriately of one of the so-called "Boykin-Jaworski" rights. Reference to the case law is necessary to determine those errors that require reversal of the plea. The Committee takes the view that as a general proposition, rules of procedure should not attempt to specify the substantive law.

~~RULE 6.311 CHALLENGING PLEA AFTER SENTENCE~~

~~(A) Motion to Withdraw Plea. The defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal. After the time for filing an application for leave, the defendant may seek relief in accordance with the procedure set forth in subchapter 6.500.~~

~~(B) Remedy. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.~~

~~(C) Preservation of Issues. A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this~~

~~subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.~~

~~(D) Vacation of Plea On Prosecutor's Motion. On the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement.~~

Committee Comment

Merged with 6.310.

RULE 6.31~~2~~**1** EFFECT OF WITHDRAWAL OR VACATION OF PLEA

If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered.

Committee Comment

Simply renumbered given the merging of 6.310 and 6.311.

RULE 6.401 RIGHT TO TRIAL BY JURY OR BY THE COURT

The defendant has the right to be tried by a jury, or may, with the consent of the prosecutor and approval by the court, elect to waive that right and be tried before the court without a jury.

Committee Comment

No change.

RULE 6.402 WAIVER OF JURY TRIAL BY THE DEFENDANT

(A) Time of Waiver. The court may not accept a waiver of trial by jury until after the defendant has ~~had~~ **been arraigned** or waived an arraignment on the information**, or, in a court where arraignment on the information has been eliminated under rule 6.113(D), after the defendant has otherwise been provided with a**

copy of the information, and has been offered an opportunity to consult with a lawyer.

(B) Waiver and Record Requirements. Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

Committee Comment

The only change is to recognize the proposed amendment to Rule 6.113 that would permit a circuit court to come up with a plan to eliminate the arraignment on the information. The Committee also decided to use "a court" rather than "circuit court," because of the use of unified courts in some counties.

RULE 6.403 TRIAL BY THE JUDGE IN WAIVER CASES

When trial by jury has been waived, the court with jurisdiction must proceed with the trial. The court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record.

Committee Comment

No change.

RULE 6.410 JURY TRIAL; NUMBER OF JURORS; UNANIMOUS VERDICT

(A) Number of Jurors. Except as provided in this rule, a jury that decides a case must consist of 12 jurors. At any time before a verdict is returned, the parties may stipulate with the court's consent to have the case decided by a jury consisting of a specified number of jurors less than 12. On being informed of the parties' willingness to stipulate, the court must personally advise the defendant of the right to have the case decided by a jury consisting of 12 jurors. By addressing the defendant personally, the court must ascertain that the defendant understands the right and that the defendant voluntarily chooses to give up that right as provided in the stipulation. If the court finds that the requirements for a valid waiver have been satisfied, the court may accept the stipulation. Even if the requirements for a valid

waiver have been satisfied, the court may, in the interest of justice, refuse to accept a stipulation, but it must state its reasons for doing so on the record. The stipulation and procedure described in this subrule must take place in open court and a verbatim record must be made.

B) Unanimous Verdicts. A jury verdict must be unanimous.

Committee Comment

No change.

RULE 6.411 ADDITIONAL JURORS

The court may impanel more than 12 jurors. If more than the number of jurors required to decide the case are left on the jury before deliberations are to begin, the names of the jurors must be placed in a container and names drawn from it to reduce the number of jurors to the number required to decide the case. The court may retain the alternate jurors during deliberations. If the court does so, it shall instruct the alternate jurors not to discuss the case with any other person until the jury completes its deliberations and is discharged. If an alternate juror replaces a juror after the jury retires to consider its verdict, the court shall instruct the jury to begin its deliberations anew.

Committee Comment

No change. The rule was recently amended to allow alternate jurors to be retained and recalled.

RULE 2.511 IMPANELING THE JURY

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(F) Replacement of Challenged Jurors. After the jurors have been seated in the jurors' box and a challenge for cause is sustained or a peremptory challenge **or challenges** exercised, another juror **or jurors** must be selected and examined before further challenges are made. Th~~is~~**ese** juror**(s)** ~~is~~ **are** subject to challenge as are other jurors.

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Committee Comment

Rule 6.412 incorporates MCR 2.511 by reference; MCR 2.511(E)(3)(a) provides that "First the plaintiff and then the defendant may exercise *one or more* peremptory challenges until each party successively waives further peremptory challenges or all the challenges have been exercised, at which point jury selection is complete." This suggests that a party may exercise more than one peremptory challenge at a time. But MCR 2.511(F) requires seating of another juror after *a* challenge for cause is sustained or *a* peremptory challenge is exercised, and that requirement must be followed. This conflict was noted over 15 years ago in *People v. Glover,* 154 Mich App 22, 44 (1986). Decisions have held that a trial judge cannot *require* that multiple challenges be exercised at once, but have not found reversible error –though finding error– where the trial judge *permits* the practice. See *People v Parker* (unpublished opinion), 2000 WL 33406705 (10/30/2000); *People v Russell*, 434 Mich 932 (1990). To end this conflict the Committee proposes that the rule permit the exercise of multiple peremptory challenges at one time, accomplished by a slight change to paragraph (F).

The Committee also notes that by recent statutory amendment a person convicted of a felony is not qualified to be a juror. MCR 2.511(D)(2), permitting a challenge for cause for a juror who has a felony record, is now redundant, as (D)(1) provides for a challenge for cause for a juror who is not qualified by law to be a juror.

RULE 6.412 SELECTION OF THE JURY

(A) Selecting and Impaneling the Jury. Except as otherwise provided by the rules in this subchapter, MCR 2.510 and 2.511 govern the procedure for selecting and impaneling the jury.

(B) Instructions and Oath Before Selection. Before beginning the jury selection process, the court should give the prospective jurors appropriate preliminary instructions and must have them sworn.

(C) Voir Dire of Prospective Jurors.

(1) Scope and Purpose. The scope of voir dire examination of prospective jurors is within the discretion of the court. It should be conducted for the purposes of discovering grounds for challenges for cause and of gaining knowledge to facilitate an intelligent exercise of peremptory challenges. The court should confine the examination to these purposes and prevent abuse of the examination process.

(2) Conduct of the Examination. The court may conduct the examination of prospective jurors or permit the lawyers to do so. If the court conducts the

examination, it may permit the lawyers to supplement the examination by direct questioning or by submitting questions for the court to ask. On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors.

(D) Challenges for Cause.

(1) Grounds. A prospective juror is subject to challenge for cause on any ground set forth in MCR 2.511(D) or for any other reason recognized by law.

(2) Procedure. If, after the examination of any juror, the court finds that a ground for challenging a juror for cause is present, the court on its own initiative should, or on motion of either party must, excuse the juror from the panel.

(E) Peremptory Challenges.

(1) Challenges by Right. Each defendant is entitled to 5 peremptory challenges unless an offense charged is punishable by life imprisonment, in which case a defendant being tried alone is entitled to 12 peremptory challenges, 2 defendants being tried jointly are each entitled to 10 peremptory challenges, 3 defendants being tried jointly are each entitled to 9 peremptory challenges, 4 defendants being tried jointly are each entitled to 8 peremptory challenges, and 5 or more defendants being tried jointly are each entitled to 7 peremptory challenges. The prosecutor is entitled to the same number of peremptory challenges as a defendant being tried alone, or, in the case of jointly tried defendants, the total number of peremptory challenges to which all the defendants are entitled.

(2) Additional Challenges. On a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges. The additional challenges granted by the court need not be equal for each party.

(F) ~~Instructions and~~ Oath After Selection. After the jury is selected and before trial begins, the court must have the jurors sworn~~ and should give them appropriate pretrial instructions~~.

Committee Comment

Paragraph (F): The Committee believes that the language regarding appropriate pretrial instructions belongs in Rule 6.414.

RULE 6.414 CONDUCT OF JURY TRIAL

(A) Before trial begins, the court should give the jury appropriate pretrial instructions.

(~~A~~**B)** Court's Responsibility. The trial court must control the proceedings during trial, limit the evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the evidence presented in court. The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.

(~~B~~ **C**) Opening Statements. Unless the parties and the court agree otherwise, the prosecutor, before presenting evidence, must make a full and fair statement of the prosecutor's case and the facts the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a like statement. The court may impose reasonable **time** limits on the opening statements.

(~~C~~ **D**) Note Taking by Jurors. The court may permit the jurors to take notes regarding the evidence presented in court. If the court permits note taking, it must instruct the jurors that they need not take notes and that they should not permit note taking to interfere with their attentiveness. The court also must instruct the jurors ~~both~~ to keep their notes confidential except as to other jurors **during deliberations** ~~and to destroy their notes when the trial is concluded~~. **The court may, but need not, allow jurors to take their notes into deliberations. If the court decides not to permit the jurors to take their notes into deliberations, the court must so inform the jurors at the same time it permits the note taking. The court shall insure that all juror notes are collected and destroyed when the trial is concluded.**

(E) Juror Questions. The court may, in its discretion, permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that insures that inappropriate questions are not asked, and that the parties have the opportunity to object to the questions.

(~~D~~ **F**) View. The court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the view, no persons other than, **as permitted by the trial judge,** the officer ~~designated by the court~~ **in charge of the jurors, orany person appointed by the court to direct the jurors' attention to a particular place or site, and the trial judge,** may speak to the jury concerning a subject connected with the trial; any such communication must be recorded in some fashion.

(~~E~~ **G**) Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the prosecutor may offer a rebuttal limited to the issues raised in the defendant's argument. The court may impose reasonable **time** limits on the closing arguments.

(~~F~~ **H**) Instructions to the Jury. Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but ~~with the parties' consent~~ **at the discretion of the court, and on notice to the parties,** the court may instruct the jury before the parties make closing arguments**, and give any appropriate further instructions after argument**. After jury deliberations begin, the court may give additional instructions that are appropriate.

(~~G~~ **I**) Materials in Jury Room. The court may permit the jury, on retiring to deliberate, to take into the jury room a writing, other than the charging document, setting forth the elements of the charges against the defendant and any exhibits and writings admitted into evidence. On the request of a party or on its own initiative, the court may provide the jury with a full set of written instructions, a full set of electronically recorded instructions, or a partial set of written or recorded instructions if the jury asks for clarification or restatement of a particular instruction or instructions or if the parties agree that a partial set may be provided and agree on the portions to be provided. If it does so, the court must ensure that such instructions are made a part of the record.

(~~H~~ **J**) Review of Evidence. If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested

review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Committee Comment

Paragraph (A): This language is simply moved from MCR 6.413(F).

Paragraphs (B) and (G): The proposal adds the word "time" before limits, as the language "reasonable limits" is directed at limits on duration of the arguments.

Paragraph (D). The proposal gives the trial judge the option of allowing jurors who take notes to take them into the jury room, or preclude them from doing so. To allow jurors to take notes but preclude their use during deliberations is not pointless, as the mere fact of taking notes may help focus attention during trial. But if the judge determines not to let the jurors take the notes into deliberations, the jurors must be informed of this fact at the outset. Language that the jurors should destroy the notes is deleted as inconsistent with the CJI, which directs that the *court* is to take care of collection and destruction of the note, and so language to this effect is substituted.

Paragraph (E). This is a new paragraph. As a matter of completeness, the Committee believes that this rule should include a provision concerning jurors questioning witnesses. This practice is within the discretion of the trial judge, and the Committee believes that the judge should insure that whatever procedure he or she employs avoids the asking of inappropriate questions, and allows the parties to object to questions.

Paragraph (F): There is a concern that the current rule might be viewed as suggesting that nothing may be said to the jurors when they are taken to view a scene that directs their attention to that at which they are supposed to be looking, so that jurors might arrive at a scene and never fulfill the purpose of the view. The proposal simply provides that the judge may appoint a person to direct the jurors' attention to the appropriate location or site. No person other than the officer in charge of the jury, this person, and the trial judge may speak to the jury, so that the trial judge may control the situation as appropriate. In the event there might be some contest as to what occurred, the rule requires that some method of recording any communication be used; the method is left to the trial judge, which may be electronic, such as by use of a video recorder, but need not be.

Paragraph (H): The proposal removes the requirement of the consent of the parties before the trial judge can instruct the jury before closing arguments; language is also added that if the judge chooses this option, the judge may also give further appropriate instructions after argument.

RULE 6.416 PRESENTATION OF EVIDENCE

Subject to the rules in this chapter and to the Michigan rules of evidence, each party has discretion in deciding what witnesses and evidence to present.

Committee Comment

No change.

RULE 6.419 MOTION FOR DIRECTED VERDICT OF ACQUITTAL

(A) Before Submission to Jury. After the prosecutor has rested the prosecution's case in chief and before the defendant presents proofs, the court on its own initiative may, or on the defendant's motion must, direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. The court may not reserve decision on the defendant's motion. If the defendant's motion is made after the defendant presents proofs, the court may reserve decision on the motion, submit the case to the jury, and decide the motion before or after the jury has completed its deliberations.

(B) After Jury Verdict. After a jury verdict, the defendant may file an original or renewed motion for directed verdict of acquittal in the same manner as provided by MCR 6.431(A) for filing a motion for a new trial.

(C) Bench Trial. In an action tried without a jury, after the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence if the motion is not granted, may move for acquittal on the ground that a reasonable doubt exists. The court may then determine the facts and render a verdict of acquittal, or may decline to render judgment until the close of all the evidence. If the court renders a verdict of acquittal, the court shall make findings of fact.

(~~C~~ **D**) Conditional New Trial Ruling. If the court grants a directed verdict of acquittal after the jury has returned a guilty verdict, it must also conditionally rule on any motion for a new trial by determining whether it would grant the motion if the directed verdict of acquittal is vacated or reversed.

(~~D~~ **E**) Explanation of Rulings on Record. The court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict of acquittal and for conditionally granting or denying a motion for a new trial.

Committee Comment

The Committee proposes a new paragraph (C), borrowed from MCR 2.504(B)(2), which arguably is applicable to criminal cases in any event. At a bench trial, the trial judge is the finder of fact, determining the credibility of witnesses and the weight of evidence. If, at the conclusion of the prosecution's case, the trial judge entertains a reasonable doubt, then on a motion for acquittal the trial court should be able to enter its verdict. The trial judge, however, may not have reached a conclusion at this point, and may direct that the defendant either present proofs or rest, the court rendering its verdict at the conclusion of all testimony.

RULE 6.420 VERDICT

(A) Return. The jury must return its verdict in open court.

(B) Several Defendants. If two or more defendants are jointly on trial, the jury at any time during its deliberations may return a verdict with respect to any defendant as to whom it has agreed. If the jury cannot reach a verdict with respect to any other defendant, the court may declare a mistrial as to that defendant.

(C) Several Counts. If a defendant is charged with two or more counts, and the court determines that the jury is deadlocked so that a mistrial must be declared, the court may inquire of the jury whether it has reached a unanimous verdict on any of the counts charged, and if so may accept the jury's verdict on that count or counts.

~~(C~~ **D)** Poll of Jury. Before the jury is discharged, the court on its own initiative may, or on the motion of a party must, have each juror polled in open court as to whether the verdict announced is that juror's verdict. If polling discloses the jurors are not in agreement, the court may (1) discontinue the poll and order the jury to retire for further deliberations, or (2) either (a) with the defendant's consent, or (b) after determining that the jury is deadlocked or that some other manifest necessity exists, declare a mistrial and discharge the jury.

Committee Comment

Paragraph (C). On occasion, a jury considering multiple counts announces that it is deadlocked without making clear that it has in fact reached a verdict on one or more counts, while being deadlocked on another count or counts. The proposed new paragraph specifically authorizes the judge to inquire of the jury —but only after the judge has determined that further deliberations would be pointless, so that a mistrial must be declared— whether it has reached a verdict on any count or counts, and, if the jury has, to accept the verdict on those counts,

RULE 6.425 SENTENCING; APPOINTMENT OF APPELLATE COUNSEL

(A) Presentence Report; Contents. Prior to sentencing, the probation officer must investigate the defendant's background and character, verify material information, and report in writing the results of the investigation to the court. The report must be succinct and, depending on the circumstances, include:

(1) a description of the defendant's prior criminal convictions and juvenile adjudications,

(2) a complete description of the offense and the circumstances surrounding it,

(3) a brief description of the defendant's vocational background and work history, including military record and present employment status,

(4) a brief social history of the defendant, including marital status, financial status, length of residence in the community, educational background, and other pertinent data,

(5) the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report,

(6) information concerning the financial, social, psychological, or physical harm suffered by any victim of the offense, including the restitution needs of the victim,

(7) if provided and requested by the victim, a written victim's impact statement as provided by law,

(8) any statement the defendant wishes to make,

(9) a statement prepared by the prosecutor on the applicability of any consecutive sentencing provision,

(10) an evaluation of and prognosis for the defendant's adjustment in the community based on factual information in the report,

(11) a specific recommendation for disposition, and

(12) any other information that may aid the court in sentencing.

Regardless of the sentence imposed, the court must have a copy of the presentence report and of any psychiatric report sent to the Department of Corrections. If the defendant is sentenced to prison, the copies must be sent with the commitment papers.

(B) Presentence Report; Disclosure Before Sentencing. The court must **provide copies of the presentence report to** ~~permit~~ the prosecutor **and** the defendant's lawyer, **or the defendant if not represented by a lawyer,** ~~, and the defendant to review the presentence report~~ at a reasonable time before the day of sentencing. The court may exempt from disclosure information or diagnostic opinion that might seriously disrupt a program of rehabilitation and sources of information that have been obtained on a promise of confidentiality. When part of the report is not disclosed, the court must inform the parties that information has not been disclosed and state on the record the reasons for nondisclosure. To the extent it can do so without defeating the purpose of nondisclosure, the court also must provide the parties with a written or oral summary of the nondisclosed information and give them an opportunity to comment on it. The court must have the information exempted from disclosure specifically noted in the report. The court's decision to exempt part of the report from disclosure is subject to appellate review.

(C) Presentence Report; Disclosure After Sentencing. After sentencing, the court, on written request, must provide the prosecutor, the defendant's lawyer, or the defendant not represented by a lawyer, with a copy of the presentence report and any attachments to it. The court must exempt from disclosure any information the sentencing court exempted from disclosure pursuant to subrule (B).

(D) ~~Imposition of Sentence.~~

~~(1)~~ Sentencing Guidelines. The court must use the sentencing guidelines, as provided by law. **Proposed scoring of the guidelines shall accompany the presentence report**. Not later than the date of sentencing, the court must complete a sentencing information report on a form to be prescribed by and returned to the state court administrator.

(E) ~~(2)~~ Sentencing Procedure.

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing the court~~, complying on the record,~~ must **on the record**:

(a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,

(b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule ~~(D)(3)~~**(E)(2)**,

(c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence,

(d) state the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled,

(e) **if the sentence imposed is not within the guidelines range,** articulate its reasons for **departure** ~~imposing the sentence given~~, and

(f) ~~if a victim of the crime has suffered harm and the court does not order restitution as provided by law or orders only partial restitution, state the reasons for its action~~ **order that the defendant make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, o r to that victim's estate.**

(2) Resolution of Challenges. If any information in the presentence report is challenged, the court must **allow the parties to be heard regarding the challenge, and** make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge or determines that it will not take the challenged information into account in sentencing, it must direct the probation officer to

(a) correct or delete the challenged information in the report, whichever is appropriate, and

(b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections.

(~~E~~**F**) Advice Concerning the Right to Appeal; Appointment of Counsel.

(1) In a case involving a conviction following a trial, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a) the defendant is entitled to appellate review of the conviction and sentence,

(b) if the defendant is financially unable to retain a lawyer, the court will appoint a lawyer to represent the defendant on appeal, and

(c) the request for a lawyer must be made within 42 days after sentencing **or may be denied as untimely**.

(2) In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that

(a) the defendant is entitled to file an application for leave to appeal**.**

(b) **I**f the defendant is financially unable to retain a lawyer, the court must **advise the defendant of the right to appointed counsel** ~~appoint a lawyer~~ to represent the defendant on appeal if

(i) the defendant's sentence exceeds the upper limit of the minimum sentence range of the applicable sentencing guidelines,

(ii) the defendant seeks leave to appeal a conditional plea under MCR 6.301(C)(2),

(iii) the prosecuting attorney seeks leave to appeal, or

(iv) the Court of Appeals or the Supreme Court grants the defendant's application for leave to appeal.

(c) If the defendant is financially unable to retain a lawyer, the court, in its discretion, may appoint a lawyer to represent the defendant on appeal if all the following apply:

[i] the defendant seeks leave to appeal on the basis of an alleged improper scoring of an offense variable or a prior record variable,

[ii] the defendant objected to the scoring or otherwise preserved the matter for appeal, and

[iii] the sentence constitutes an upward departure from the upper limit of the minimum sentence range that the defendant alleges should have been scored; and

(d) the request for a lawyer must be made within 42 days after sentencing **or may be denied for untimeliness**, unless the entitlement to counsel arises under (b)(iii) or (iv).

~~With regard to paragraphs (b) and (c), the court is required to give only the advice that is applicable to the particular circumstances.~~ Upon sentencing, the court shall give the defendant a form developed by the State Court Administrative Office that the defendant may complete and file as an application for leave to appeal.

(3) The court also must give the defendant a request for counsel form containing an instruction informing the defendant that the form must be completed and returned to the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer. The 42-day time limit does not apply if the entitlement to counsel arises under subrule (2)(b)(iii) or (iv).

~~(4) When imposing sentence in a case in which sentencing guidelines enacted in 1998 PA 317, MCL 777.1 et seq.; MSA 28.1274(11), et seq., are applicable, if the court imposes a minimum sentence that is longer or more severe than the range provided by the sentencing guidelines, the court must advise the defendant on the record and in writing that the defendant may seek appellate review of the sentence, by right if the conviction followed trial or by application if the conviction entered by plea, on the ground that it is longer or more severe than the range provided by the sentencing guidelines.~~

(~~F~~G) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal.

(1) Appointment of Lawyer.

(a) Unless there is a postjudgment motion pending, the court must rule on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the court must rule on the request after the court's disposition of the pending motion and within 14 days after that disposition.

(b) In a case involving a conviction following a trial, if the defendant is indigent, the court must enter an order appointing a lawyer if the request is filed within 42 days after sentencing or within the time for filing an appeal of right. The court should liberally grant an untimely

request as long as the defendant may file an application for leave to appeal.

(c) In a case involving a conviction following a guilty plea. See paragraph (F)(2).

(~~c~~ **d**) Scope of Appellate Lawyer's Responsibilities. The responsibilities of the appellate lawyer appointed to represent the defendant include representing the defendant

(i) in available postconviction proceedings in the trial court the lawyer deems appropriate,

(ii) in postconviction proceedings in the Court of Appeals,

(iii) in available proceedings in the trial court the lawyer deems appropriate under MCR 7.208(B) or 7.211(C)(1), and

(iv) as appellee in relation to any postconviction appeal taken by the prosecutor.

(2) Order to Prepare Transcript. The appointment order also must

(a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210,

(i) the trial or plea proceeding transcript,

(ii) the sentencing transcript, and

(iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and

(b) provide for the payment of the reporter's fees.

The court must promptly serve a copy of the order on the prosecutor, the defendant, the appointed lawyer, the court reporter, and the Michigan Appellate Assigned Counsel System.

(3) Order as Claim of Appeal; Trial Cases. In a case involving a conviction following a trial, if the defendant's request for a lawyer, timely or not, was made within the time for filing a claim of appeal, the order described in (F)(1) and (2) must be entered on a form approved by the State Court Administrator's Office, entitled "Claim of Appeal and Appointment of

Counsel," and the court must immediately send to the Court of Appeals a copy of the order and a copy of the judgment being appealed. The court also must file in the Court of Appeals proof of having made service of the order as required in subrule (F)(2). Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

Committee Comment

Paragraph (A): The Committee is of the view that a procedure that permits immediate sentence without preparation of a presentence report —so long as the guidelines are scored— might well be appropriate, with the consent of the defendant, the prosecutor, and the victim. The Committee has not proposed this course, however, because some years ago the Supreme Court held that a presentence report is not waivable in a felony case. *People v. Brown*, 393 Mich 174 (1974). Unless the Court wishes to reconsider this holding, then, waiver cannot occur.

Paragraph (B): The Committee proposes that copies of the presentence report be provided, rather than simply an opportunity to review the report. This is the practice in some counties presently. The copies need not be mailed by the court, but simply made available.

Paragraph (D) and new (E): As a matter of drafting, the Committee proposes that the paragraph be broken into two separate paragraphs. Proposed paragraph (D) includes a requirement that proposed guidelines scoring accompany the presentence report. Newly number paragraph (E) includes a requirement that the judge articulate reasons for departure if the sentence is not within the guidelines range; because statute now requires that a sentence within the guidelines be affirmed, the requirement that the judge articulate reasons in all cases, even where the sentence is within the guidelines, was accordingly eliminated, and replaced by the requirement regarding departures from the guidelines.

Current (D)(2)(f) is changed in that under the restitution statute as amended, MCL 780.766, there is no such thing as "partial restitution," nor is the defendant's ability to pay taken into account in determining the amount of the order.

In (E)(2) it is made clear the court must allow the parties, both prosecution and defense, to be heard with regard to a resolution of challenges to the presentence report. This does not necessarily require an evidentiary hearing; the method of resolution of the challenge is within the discretion of the sentencing judge.

Paragraph (F): The Committee believes that the final paragraph of current paragraph (E), now renumbered as (F), is now redundant, and therefore recommends it be dropped.

Paragraph (G). A new (1)(c) is added to the former paragraph (F). (1)(b) refers to appointment of counsel in cases of a conviction following a trial. For purposes of completeness the new (1)(c) refers to appointment of counsel in cases of a conviction following a guilty plea, but to

avoid needless repetition simply refers to paragraph (F)(2), which contains the necessary information.

RULE 6.427 JUDGMENT

Within 7 days after sentencing, the court must date and sign a written judgment of sentence that includes:

(1) the title and file number of the case;
(2) the defendant's name;
(3) the crime for which the defendant was convicted;
(4) the defendant's plea;
(5) the name of the defendant's attorney if one appeared;
(6) the jury's verdict or the finding of guilt by the court;
(7) the term of the sentence;
(8) the place of detention;
(9) the conditions incident to the sentence; and
(10) whether the conviction is reportable to the Secretary of State pursuant to ~~MCL 257.732; MSA 9.2432~~ **statute,** and, if so, the defendant's Michigan driver's license number.

If the defendant was found not guilty or for any other reason is entitled to be discharged, the court must enter judgment accordingly. The date a judgment is signed is its entry date.

Committee Comment

Because there are now statutes in addition to MCL 257.732 that require reporting of the conviction to the Secretary of State, and these statutes are subject to change, the Committee thinks the preferable course is to refer more generally to convictions that are required by statute to be reported, rather than listing the statutes.

RULE 6.428 REISSUANCE OF JUDGMENT

If the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent him or her on direct appeal from the judgment either disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right, the trial court shall issue an order restarting the time in which to file an appeal of right.

Committee Comment

The Supreme Court has published for comment a version of this rule as a part of the 6.500 chapter, and, in its proposed revisions to that chapter, the Committee has included it there. But because relief from the judgment is not actually sought in the circumstances described, but in essence reissuance of the judgment so as to restore the appeal of right, the Committee believes that the provisions may well be more logically located here than in the relief from judgment chapter.

RULE 6.429 CORRECTION AND APPEAL OF SENTENCE

(A) Authority to Modify Sentence. The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law.

(B) Time for Filing Motion.

(1) A motion ~~for resentencing~~ **to correct an invalid sentence** may be filed **by either party** within 42 days after entry of the judgment.

(2) If a claim of appeal has been filed, a motion ~~for resentencing~~ **to correct an invalid sentence** may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).

(3) If the defendant fails to file a timely claim of appeal, the defendant may file a motion ~~for resentencing~~ **to correct an invalid sentence** within ~~the time for filing an application for leave to appeal~~ **6 months of entry of the judgment of conviction and sentence**.

(4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

(a) Preservation of Issues Concerning Presentence Report and Sentencing Guidelines. A party may not raise on appeal an issue challenging the accuracy of the presentence report or the scoring of the sentencing guidelines unless the party has raised the issue at or before sentencing, **in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals**. ~~or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered.~~ Any other challenge may be brought only by motion for relief from judgment under subchapter 6.500.

Committee Comment

Generally. The Committee discussed whether some procedure akin to the FRCP 35, which permits a trial judge to reduce a valid sentence on motion of the prosecutor because of assistance provided by the defendant, should be adopted, but concluded that the policy considerations involved are of the sort that should be resolved by legislative decision.
Paragraph (B): Because a "resentencing" is not permitted when the sentence is valid, and because an invalid sentence may be correctable without an entirely new sentencing procedure, the Committee proposes using the term "correct an invalid sentence" rather than "resentencing." The Committee also believes that one year is an overly generous time period to allow the filing of the motion, and proposes to substitute a six month period.

Paragraph (C): The language of paragraph (C) has caused a split in the Court of Appeals that likely ought to be remedied. Paragraph (C) provides that guidelines scoring issues must be raised either at sentencing or after that time only if the party challenging scoring "demonstrates the challenge was brought as soon as the inaccuracy could reasonably have been discovered." The statute, MCL 769.34(10), provides that a scoring issue cannot be raised on appeal unless "the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." In *People v McGuffey*, 251 Mich App 155 (2002) the panel held that the court rule prevails over the statute, finding that the statute allows challenges to be raised when the challenge would be precluded by the court rule. But in *People v Wilson*, 252 Mich App 390 (2002) two members of the panel expressed disagreement with *McGuffey*; apparently no conflict panel vote was triggered because the disagreement did not affect the result of the case. The Committee recommends conforming the rule to the statute to end any conflict.

RULE 6.431 NEW TRIAL

(A) Time for Making Motion.

(1) A motion for a new trial may be filed within 42 days after entry of the judgment**, or if counsel is appointed following a timely request for counsel, within 42 days after the appointment of counsel**.

(2) If a claim of appeal has been filed, a motion for a new trial may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).

~~(3) If the defendant fails to file a timely claim of appeal, the defendant may file a motion for a new trial within the time for filing an application for leave to appeal.~~

(4 **3**) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

(B) Reasons for Granting. On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice. The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record.

(C) Trial Without Jury. If the court tried the case without a jury, it may, on granting a new trial and with the defendant's consent, vacate any judgment it has entered, take additional testimony, amend its findings of fact and conclusions of law, and order the entry of a new judgment.

(D) Inclusion of Motion for Judgment of Acquittal. The court must consider a motion for a new trial challenging the weight or sufficiency of the evidence as including a motion for a directed verdict of acquittal.

Committee Comment

A motion for new trial is timely where the defendant timely requests the appointment of counsel, and the motion is filed within 42 days of appointment. Given the ability of a defendant who has failed to file a timely claim of appeal to file for leave from the Court of Appeals for one year, the Committee believes that paragraph (A)(3) should be deleted.

RULE 6.433 DOCUMENTS FOR POSTCONVICTION PROCEEDINGS; INDIGENT DEFENDANT

(A) Appeals of Right. An indigent defendant may file a written request with the sentencing court for specified court documents or transcripts, indicating that they are required to pursue an appeal of right. The court must order the clerk to provide the defendant with copies of documents without cost to the defendant, and, unless the transcript has already been ordered as provided in MCR 6.425(F)(2), must order the preparation of the transcript.

(B) Appeals by Leave. An indigent defendant who may file an application for leave to appeal may obtain copies of transcripts and other documents as provided in this subrule.

(1) The defendant must make a written request to the sentencing court for specified documents or transcripts indicating ~~that~~ **why** they are required to prepare an application for leave to appeal.

(2) If the requested materials have been filed with the court and not provided previously to the defendant, **on order of the court** the court clerk must provide a copy to the defendant. If the requested materials have been provided previously to the defendant, on defendant's showing of good cause to the court, the clerk must provide the defendant with another copy.

(3) If the request includes the transcript of a proceeding that has not been transcribed, the court must order the materials transcribed and filed with court. After the transcript has been prepared, court clerk must provide a copy to the defendant.

(C) Other Postconviction Proceedings. An indigent defendant who is not eligible to file an appeal of right or an application for leave to appeal may obtain records and documents as provided in this subrule.

(1) The defendant must make a written request to the sentencing court for specific court documents or transcripts indicating ~~that~~ **why** the materials are required to pursue postconviction remedies in a state or federal court and are not otherwise available to the defendant.

(2) If the documents or transcripts have been filed with the court, the clerk, **on order of the court,** must provide the defendant with copies of such materials without cost to the defendant.

(3) The court may order the transcription of additional proceedings if it finds that there is good cause for doing so. After such a transcript has been prepared, the clerk must provide a copy to the defendant.

(4) Nothing in this rule precludes the court from ordering materials to be supplied to the defendant in a proceeding under subchapter 6.500.

Committee Comment

The rule is revised slightly to provide that an indication *why* requested material is necessary must be made, and that the trial judge may pass on the request, declining to provide material that the court determines is not required.

RULE 6.435 CORRECTING MISTAKES

(A) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.

(B) Substantive Mistakes. After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.

(C) Correction of Record. If a dispute arises as to whether the record accurately reflects what occurred in the trial court, the court, after giving the parties the opportunity to be heard, must resolve the dispute and, if necessary, order the record to be corrected.

(D) Correction During Appeal. If a claim of appeal has been filed or leave to appeal granted in the case, corrections under this rule are subject to MCR 7.208(A) and

Committee Comment

No change.

RULE 6.440 DISABILITY OF JUDGE

(A) During Jury Trial. If, by reason of death, sickness, or other disability, the judge before whom a jury trial has commenced is unable to continue with the trial, another judge regularly sitting in or assigned to the court, on certification of having become familiar with the record of the trial, may proceed with and complete the trial.

(B) During Bench Trial. If a judge becomes disabled during a trial without a jury, another judge may be substituted for the disabled judge, but only if

(1) both parties consent in writing to the substitution, and

(2) the judge certifies having become familiar with the record of the trial, including the testimony previously given.

(C) After Verdict. If, after a verdict is returned or findings of fact and conclusions of law are filed, the trial judge because of disability becomes unable to perform the remaining duties the court must perform, another judge regularly sitting in or assigned to the court may perform those duties; but if that judge is not satisfied of ~~an~~ **his or her** ability to perform those duties because of not having presided at the trial or determines that it is appropriate for any other reason, the judge may grant the defendant a new trial.

Committee Comment

No substantive change.

RULE 6.445 PROBATION REVOCATION

(A) Issuance of Summons; Warrant. On finding probable cause to believe that a probationer has violated a condition of probation, the court may

(1) issue a summons in accordance with MCR 6.103(B) and (C) for the probationer to appear for arraignment on the alleged violation, or

(2) issue a warrant for the arrest of the probationer.
An arrested probationer must promptly be brought before the court for arraignment on the alleged violation.

(B) Arraignment on the Charge. At the arraignment on the alleged probation violation, the court must

(1) ensure that the probationer receives written notice of the alleged violation,

(2) advise the probationer that

(a) the probationer has a right to contest the charge at a hearing, and

(b) the probationer is entitled to a lawyer's assistance at the hearing and at all subsequent court proceedings, and that the court will appoint a lawyer at public expense if the probationer wants one and is financially unable to retain one,

(3) if requested and appropriate, appoint a lawyer,

(4) determine what form of release, if any, is appropriate, and

(5) subject to subrule (C), set a reasonably prompt hearing date or postpone the hearing.

(C) Scheduling or Postponement of Hearing. The hearing of a probationer being held in custody for an alleged probation violation must be held within 14 days after the arraignment or the court must order the probationer released from that custody pending the hearing. If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, the court may postpone the hearing for the outcome of that prosecution.

(D) Continuing Duty to Advise of Right to Assistance of Lawyer. Even though a probationer charged with probation violation has waived the assistance of a lawyer, at each subsequent proceeding the court must comply with the advice and waiver procedure in MCR 6.005(E).

(E) The Violation Hearing.

(1) Conduct of the Hearing. The evidence against the probationer must be disclosed to the probationer. The probationer has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses. The court may consider only evidence that is relevant to the violation alleged, but it need not apply the rules of evidence except those pertaining to privileges. The state has the burden of proving a violation by a preponderance of the evidence.

(2) Judicial Findings. At the conclusion of the hearing, the court must make findings in accordance with MCR 6.403.

(F) Pleas of Guilty. ~~With the consent of the court that granted probation, t~~ **T**he probationer may, at the arraignment or afterward, plead guilty to the violation. Before accepting a guilty plea, the court, speaking directly to the probationer and receiving the probationer's response, must

(1) advise the probationer of the maximum possible prison sentence for the offense,

(~~1~~ **2**) advise the probationer that by pleading guilty the probationer is giving up the right to a contested hearing and, if the probationer is proceeding without legal representation, the right to a lawyer's assistance as set forth in subrule (B)(2)(b),

(~~2~~ **3**) advise the probationer of the maximum possible jail or prison sentence for the offense,

(~~3~~ **4**) ascertain that the plea is understandingly, voluntarily, and knowingly made, and

(~~4~~ **5)** establish factual support for a finding that the probationer is guilty of the alleged violation.

(G) Sentencing. If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration. The court may not sentence the probationer to prison without having considered a current presentence report and having complied with the provisions set forth in MCR 6.425(B), (~~D)(2)~~ **(E)(1)**, and ~~(D)(3)~~ **(E)(2).**

(H) Review.

(1) In a case involving a sentence of incarceration under subrule (G), the court must advise the probationer on the record, immediately after imposing sentence, that

(a) the probationer has a right to appeal, if the conviction occurred at a contested hearing, or

(b) the probationer is entitled to file an application for leave to appeal, if the conviction was the result of a plea of guilty.

(2) In a case that involves a sentence other than incarceration under subrule (G), the court must advise the probationer on the record, immediately after imposing sentence, that the probationer is entitled to file an application for leave to appeal.

Committee Comment

Paragraph (F). The Committee believes that a probationer pleading guilty should be made aware of the maximum possible prison sentence provided for the offense.

Paragraph (G): The Supreme Court has proposed language to take account of *Shelton v Alabama*, 535 US 654, 122 S Ct 1764 (2002).

> In a misdemeanor case, the court may not impose a jail term on a probationer who was entitled to appointed counsel on the underlying offense unless the probationer was represented by an attorney or waived the right to an attorney.

There the defendant in a misdemeanor case represented himself, and was never offered appointed counsel. He was sentenced to a jail term and probation, but the jail term was suspended. The United States Supreme Court held that the Sixth Amendment does not permit activation of a suspended sentence upon an indigent defendant's violation of the terms of his probation where the State did not provide him counsel during the prosecution of the offense for which he is imprisoned. A suspended sentence is a prison term imposed for the offense of conviction. Once the prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense. This is different than "straight" probation, and then incarceration for violation of probation, where no "suspended" sentence is triggered, and thus the incarceration is for violation of probation, not the underlying offense. The Michigan Supreme Court's language provides that a jail term may not be imposed on a probationer who was "entitled to counsel" and did not validly waive counsel (and under *Shelton* a probationer is entitled to counsel if a part of the sentence includes incarceration, even if that incarceration is suspended at the time of the imposition of sentence).

The Committee believes that, as a general matter, principles of substantive law need not and should not be stated in the rules. *Shelton* is a substantive rule of law limiting the sentencing authority of the judge in a certain circumstance. There are other rules of law limiting sentencing authority that are not encompassed in the rules, and the Committee is persuaded that this is a path that should not be traveled.

SUBCHAPTER 6.500: MOTION FOR RELIEF FROM JUDGMENT

RULE 6.501 SCOPE OF SUBCHAPTER

(A) Subchapter Not Applicable to Persons Not In Custody. A judgment of conviction and sentence entered by the circuit court or the Recorder's Court for the City of Detroit may be reviewed under this chapter only if the person filing the motion is in custody pursuant to the judgment under which relief is sought.

(B) Subchapter Not Applicable to Judgments Still Subject to Appellate Review. A judgment of conviction and sentence entered by the circuit court or the Recorder's Court for the City of Detroit still subject to appellate review under subchapters 7.200 or 7.300 may not be reviewed under this subchapter.

(C) Subchapter Only Method of Review For Judgments Not Subject to Appellate Review. Unless otherwise specified by these rules, a judgment of conviction and sentence entered by the circuit court or the Recorder's Court for the City of Detroit not subject to appellate review under subchapters 7.200 or 7.300 may be reviewed only in accordance with the provisions of this subchapter.

(D) Consideration of Mislabeled Requests for Relief. A motion or other pleading seeking relief from the trial court from a judgment of conviction and sentence not subject to appellate review under subchapters 7.200 or 7.300 but not captioned as a motion brought under this subchapter shall be considered by the trial court as having been filed under this subchapter.

Committee Comment

Introduction

The purpose of MCR 6.500 as proposed by the original committee was to provide a "uniform procedure" for challenges to convictions made after exhaustion of the appeal of right. See Committee Note, 428A Mich at 40. Since that time, the question has been raised whether, given the existence of the motion for new trial statute, MCL 770.1, the Court has the power to create procedures and limitations apart from those contained in the statute. But when the statute is examined closely and in context, the question becomes not whether the Court can provide procedures and limitations for postappeal review of convictions that differ from the statute, but whether it has the authority to provide for the existence of postappeal challenges at all.

MCL 770.1, captioned "New trial; reasons for granting," provides:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done.

The statute must be read in context with MCL 770.2, which is captioned "New trial; time of motion," and provides, in pertinent part:

> (1) Except as provided in section 16, *in a case appealable as of right to the court of appeals*, a motion for a new trial shall be made within 60 days after entry of the judgment or within any further time allowed by the trial court during the 60-day period.

*****

> (4) If the applicable period of time prescribed in subsection (1)... has expired, a court of record may grant a motion for a new trial for good cause shown. ....

The claim, then, that a "delayed motion for new trial" may, under the statute, be filed at any time, and repeatedly, ignores the provision that the motion for new trial exists only in a "case appealable as of right to the court of appeals." The authority to grant a motion for new trial at any time "on good cause shown" applies only in cases "appealable of right to the court of appeals." After the constitutional appeal of right is had or forfeited, any later motion for relief in the trial court–whatever it may be called–is no longer in a "case appealable of right to the court of appeals," there being only one appeal of right. Rather than there being a question regarding the authority of the Court to limit postappeal motions for new trial, there is a question regarding the authority of the Court to *authorize* postappeal review of convictions.

The Court *does*, however, have the authority to create a system of postappeal review of convictions independent of MCL 770.1. This authority is provided both by the Michigan Constitution and by statute.

- **Article 6, § 5**: This provision delegates to the Supreme Court the authority to "establish, modify, amend and simply the practice and procedure in all courts." The provision has also been implemented by the legislature, which has provided that the Court has authority:

  - To prescribe the practice and procedure in...courts of record concerning...*the granting of new trials*.

  MCL 600.223(2)(c)(emphasis supplied).

- **Article 6, § 13:** This provision establishes the jurisdiction of the circuit court as including "original jurisdiction in all matters not prohibited by law," and also "jurisdiction of other cases and matters *as provided by rules of the supreme court*" (emphasis supplied). The provision has also been implemented by the legislature–the circuit court has the "power and jurisdiction":

  - Possessed by courts of record at the common law, as altered by the state constitution of 1963, the laws of this state, *and the rules of the supreme court.*

  - Possessed by courts and judges in chancery in England on March 1, 1847, as altered by the state constitution of 1963, the laws of this state, *and the rules of the supreme court*.

  - *Prescribed by the rules of the supreme court*.

  MCL 600.601.

Article 6, § 13–and as implemented by the legislature–gives the Supreme Court authority over the circuit courts with regard to their "power and jurisdiction," which may be controlled by *rules*

prescribed by the court. "Jurisdiction" is generally viewed as a court's authority to hear and determine a case. See e.g. *Ward v Hunter Machinery*, 263 Mich 445 (1933).

The Supreme Court, under both its practice and procedure power, and its power under Article 6, § 13 to provide jurisdiction to the circuit courts in such "other cases and matters *as provided by rules of the supreme court,*" as well as the authority granted in MCL 600.601 to provide such "jurisdiction and power" to the circuit court as it may by rule prescribe, and its authority under MCL 600.223 to "prescribe the practices and procedure" of the circuit court "concerning the granting of new trials," thus has ample authority to create the motion for relief from judgment practice, prescribe its practice and procedure, and set the conditions upon which the motion may be granted.

Paragraph (A). This subchapter is designed as a safety valve after the appeal of right is over, and is reserved for "outcome-affecting" errors. Scarce resources should be allocated to this function, the Committee believes, only when it affects someone who is incarcerated.

Paragraph (B). Current MCR 6.508(D)(1) includes the provision that "The court may not grant relief to the defendant if the motion...(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300...." This limitation is moved forward to make clear at the outset that convictions still subject to appellate review may *not* be reviewed under this subchapter.

Paragraph (C). Paragraph (B) continues the language from the current 6.501.

Paragraph (D). Before the amendments to the federal habeas corpus statute it was common practice where a *pro se* motion for postappeal relief in a federal prosecution was mislabeled for the district court to simply treat the pleading as a proper motion and consider it on the merits. But with the creation of a rule against successive petitions, consideration of a mislabeled petition as a petition under § 2255 precludes a second petition, unless the petition falls within certain exceptions. A number of federal circuits, see for example, *Castro v United States*, 277 F3d 1300 (CA 11, 2002), now require that the movant be given notice that the petition must be considered under § 2255, disabling the movant in most cases from a successive petition, or withdrawn. This rule applies only to *pro se* petitions.

Because of changes made to rule 6.508, the successive motion limitation of 6.502(G) has been deleted, and the concern in the federal system thus does not exist under the proposed revisions, and there is no reason to create a procedure that requires hard-pressed circuit courts to do other than treat mislabeled motions for what they are–motions for relief from judgment.

RULE 6.502 MOTION FOR RELIEF FROM JUDGMENT

(A) Nature of Motion. The request for relief under this subchapter must be in the form of a motion to set aside or modify the judgment. The motion must specify all of

the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge.

(B) Limitations on Motion. A motion may seek relief from one judgment only. If the defendant desires to challenge the validity of additional judgments, the defendant must do so by separate motions. For the purpose of this rule, multiple convictions resulting from a single trial or plea proceeding shall be treated as a single judgment.

(C) Form of Motion. The motion **may not be noticed for hearing, and** must be typed or legibly handwritten and include a verification by the defendant or defendant's lawyer in accordance with MCR 2.114. **Except as otherwise ordered by the court, the combined length of the motion and any memorandum of law in support may not exceed 25 pages double spaced, exclusive of attachments and exhibits. An expansion of the pages permitted shall apply also to any answer ordered by the court.** The motion must be substantially in the form approved by the State Court Administrator, and must include:

(1) The name of the defendant;

(2) The name of the court in which the defendant was convicted and the file number of the defendant's case;

(3) The place where the defendant is confined, or, if not confined, the defendant's current address;

(4) The offenses for which the defendant was convicted and sentenced;

(5) The date on which the defendant was sentenced;

(6) Whether the defendant was convicted by a jury, by a judge without jury, or on a plea of guilty, guilty but mentally ill, or nolo contendere;

(7) The sentence imposed (probation, fine, and/or imprisonment), the length of the sentence imposed, and whether the defendant is now serving that sentence;

(8) The name of the judge who presided at trial and imposed sentence;

(9) The court, title, and file number of any proceeding (including appeals and federal court proceedings) instituted by the defendant to

obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed;

(10) The name of each lawyer who represented the defendant at any time after arrest, and the stage of the case at which each represented the defendant;

(11) The relief requested;

(12) The grounds for the relief requested;

(13) The facts supporting each ground, stated in summary form;

(14) Whether any of the grounds for the relief requested were raised before; if so, at what stage of the case, and, if not, the reasons they were not raised;

(15) Whether the defendant requests the appointment of counsel, and, if so, information necessary for the court to determine whether the defendant is entitled to appointment of counsel at public expense.

Upon request, the clerk of each court with trial level jurisdiction over felony cases shall make available blank motion forms without charge to any person desiring to file such a motion.

(D) Return of Insufficient Motion. If a motion does not substantially comply with the requirements of these rules, the court may direct that it be returned to the defendant with a statement of the reasons for its return. The clerk of the court shall retain a copy of the motion.

(E) Attachments to Motion. The defendant may attach to the motion any affidavit, document, **or** evidence, ~~or memorandum of law~~ to support the relief requested.

(F) Amendment and Supplementation of Motion. The court may permit the defendant to amend or supplement the motion at any time.

~~(G) Successive Motions.~~

~~(1) Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from~~

~~judgment. A defendant may not appeal the denial or rejection of a successive motion.~~

~~(2) A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.~~

Committee Comment

Paragraph (C). Though under the current rule the court determines whether there will be a hearing on the motion, language is added to section (C) to further make clear that the motion may not be noticed for hearing. The trial judge must first make a decision on summary dismissal, and, if the motion is not summarily dismissed, must order and receive a response from the prosecutor before deciding whether to hold a hearing. Currently counsel frequently notice the motion for hearing, and thus language is added her in an attempt to end this practice.

Paragraph (C) and (E). The amendment to section (C) providing that "Except as otherwise ordered by the court, the combined length of the motion and any memorandum of law in support may not exceed 25 pages double spaced, exclusive of attachments and exhibits" was drawn from a request by the Michigan Judges Association; the amendment to section (E) is in conjunction with the amendment to section (C), and was proposed in the same letter. The language is taken from MCR 2.119 regarding motions and briefs in support of motions. Symmetry appears appropriate here, and so in 6.506 the same limitation is placed on the prosecutor's response, where one is ordered. Circuit judges in Michigan have heavy trial dockets and little assistance, unlike in the federal system or the appellate courts, and lengthy motions are unduly burdensome. The proposed revision, also in the interest of symmetry, also provides that if the trial judge expands the page limits for the motion then the page limits for the answer are automatically expanded to the same extent.

Paragraph (G). Section (G), prohibiting successive motions with certain exceptions, is eliminated because of changes made to 6.508 with regard to the grounds for relief.

RULE 6.503 FILING AND SERVICE OF MOTION

(A) Filing; Copies.

(1) A defendant seeking relief under this subchapter must file a motion **and a copy of the motion**~~, together with two copies,~~ with the clerk of the court in which the defendant was convicted and sentenced.

(2) Upon receipt of a motion, the clerk shall file it under the same number as the original conviction.

(B) Service. The ~~clerk~~ **defendant** shall serve a copy of the motion and notice of its filing on the prosecuting attorney. Unless so ordered by the court as provided in this subchapter, the filing and service of the motion does not require a response by the prosecutor.

Committee Comment

Paragraph (A). Because of the change in paragraph (B) placing the duty of service of the motion on the defendant rather than the clerk of the court, the defendant need file only one copy of the motion with the clerk of the court.

Paragraph (B). The current rule places the duty of serving the motion on the prosecutor on the clerk, rather than on the movant. Experience has taught that this does not work well; frequently the motion is not served on the prosecutor by the clerk's office even when a request for a response is made, and service is quite often not made when the trial court does not order a response. The proposed change simply requires the movant to serve the opposing party.

RULE 6.504 ASSIGNMENT; PRELIMINARY CONSIDERATION BY JUDGE; SUMMARY DENIAL

(A) Assignment to Judge. The motion shall be presented to the judge to whom the case was assigned at the time of the defendant's conviction. If the appropriate judge is not available, the motion must be assigned to another judge in accordance with the court's procedure for the re-assignment of cases. **The chief judge may reassign cases in order to correct docket control problems arising from the requirements of this rule.**

(B) Initial Consideration by Court.

(1) The court shall promptly examine the motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack. The court may request that the prosecutor provide copies of transcripts, briefs, or other records.

(2) If it plainly appears from the face of the materials described in subrule (B)(1) that the defendant is not entitled to relief, the court shall deny the motion without directing further proceedings. The order must include a concise statement of the reasons for the denial. The clerk shall serve a copy of the order on the defendant and the

prosecutor. The court may dismiss some requests for relief or grounds for relief ~~and direct further proceedings as to others.~~ **while directing a response or further proceedings to specified grounds**.

(3) If the motion is summarily dismissed under subrule (B)(2), the defendant may move for reconsideration of the dismissal within 21 days after the clerk serves the order. The motion must concisely state why the court's decision was based on a clear error and that a different decision must result from correction of the error. A motion which merely presents the same matters that were considered by the court will not be granted.

(4) If the entire motion is not dismissed under subrule (B)(2), the court shall order the prosecuting attorney to file a response as provided in MCR 6.506, and shall conduct further proceedings as provided in MCR 6.505- 6.508.

Committee Comment

Paragraph (A). Given the focus in proposed 6.508 on errors or evidence affecting the outcome of the proceedings, the committee thought it best to maintain the default rule that the motion should be heard by the judge who heard the trial, if that judge is available. This rule holds true even if that judge is no longer assigned to a division other than the criminal division of the circuit court, in courts that have divisions. But for cases where no advantage is gained by having the judge who heard the case initially also hear the motion for relief from judgment, and docket concerns arise, such as when the judge is no longer in the criminal division when the motion is filed, language has been drawn from the Chief Judge rule, MCR 8.110(C), on assignment of cases, to provide flexibility.

Paragraph (B)(2). Despite the language of the rule, it seems that some judges are not aware that they may order a response only to specified issues while dismissing the motion on others. The altered language attempts to highlight this point.

RULE 6.505 RIGHT TO LEGAL ASSISTANCE

(A) Appointment of Counsel. If the defendant has requested appointment of counsel, and the court has determined that the defendant is indigent, the court may appoint counsel for the defendant at any time during the proceedings under this subchapter. Counsel must be appointed if the court directs that oral argument or an evidentiary hearing be held.

(B) Opportunity to Supplement the Motion. If the court appoints counsel to represent the defendant, it shall afford counsel 56 days to amend or supplement the motion. The court may extend the time on a showing that a necessary transcript or record is not available to counsel.

Committee Comment

No change is proposed to the current rule.

RULE 6.506 RESPONSE BY PROSECUTOR

(A) Contents of Response. On direction of the court pursuant to MCR 6.504(B)(4), the prosecutor shall respond in writing to the allegations in the motion. **The trial court shall allow the prosecutor a minimum of 56 days to respond.** If the response refers to transcripts or briefs that are not in the court's file, the prosecutor shall submit copies of those items with the response. **Except as otherwise ordered by the court, the response shall not exceed 25 pages double spaced, exclusive of attachments and exhibits**.

(B) Filing and Service. The prosecutor shall file the response and one copy with the clerk of the court and serve one copy on the defendant.

Committee Comment

Paragraph (A). The proposed amendment to section (A) requires that the trial judge give the prosecutor at least 56 days to respond to the motion. When counsel is appointed to supplement a petition filed by a *pro se* defendant, 56 days–the same time given to file an appellant's brief in the Court of Appeals–is provided. The amendment gives the prosecutor at least the same amount of time as given the newly appointed counsel. Responding to appeals of right must take precedence to responding to collateral attacks; in the federal system, the time provided to respond to habeas corpus petitions, including extensions of time, is generous.

Consistent with the page limitations established for the motion for relief itself, requested by the Judges Association, the proposal provides the same page limitations for the prosecutor's response, where one is ordered.

RULE 6.507 EXPANSION OF RECORD

(A) Order to Expand Record. If the court does not deny the motion pursuant to MCR 6.504(B)(2), it may direct the parties to expand the record by including any additional materials it deems relevant to the decision on the merits of the motion.

The expanded record may include letters, affidavits, documents, exhibits, and answers under oath to interrogatories propounded by the court.

(B) Submission to Opposing Party. Whenever a party submits items to expand the record, the party shall serve copies of the items to the opposing party. The court shall afford the opposing party an opportunity to admit or deny the correctness of the items.

(C) Authentication. The court may require the authentication of any item submitted under this rule.

Committee Comment

No change to the current rule.

RULE 6.508 PROCEDURE; EVIDENTIARY HEARING; DETERMINATION

(A) Procedure Generally. If the rules in this subchapter do not prescribe the applicable procedure, the court may proceed in any lawful manner. The court may apply the rules applicable to civil or criminal proceedings, as it deems appropriate.

(B) Decision Without Evidentiary Hearing. After reviewing the motion and response, the record, and the expanded record, if any, the court shall determine whether an evidentiary hearing is required. If the court decides that an evidentiary hearing is not required, it may rule on the motion or, in its discretion, afford the parties an opportunity for oral argument.

(C) Evidentiary Hearing. If the court decides that an evidentiary hearing is required, it shall schedule and conduct the hearing as promptly as practicable. At the hearing, the rules of evidence other than those with respect to privilege do not apply. The court shall assure that a verbatim record is made of the hearing.

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant **unless** ~~if~~ the motion **establishes**

(1) with regard to a conviction following a trial, the probability of a different result on retrial because of

(a) a fully retroactive change in the law; or

(b) an irregularity so offensive as to seriously affect the fundamental fairness, integrity, or public reputation of judicial proceedings; or

(2) in any case,

(a) **that by clear and convincing evidence not presented at any previous proceeding, taken together with all the evidence, the defendant is actually innocent**; **or**

(b) **that the sentence imposed on the defendant exceeded that authorized by law.**

~~(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;~~

~~(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;~~

~~(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates~~

~~(a) good cause for failure to raise such grounds on appeal or in the prior motion, and~~

~~(b) actual prejudice from the alleged irregularities that support the claim for relief~~.

~~As used in this subrule, "actual prejudice" means that,~~

~~(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;~~

~~(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings~~

~~was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;~~

~~(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;~~

~~(iv) in the case of a challenge to the sentence, the sentence is invalid.~~**;**

~~The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.~~

(E) Time Limitation.

(1) If brought under subsection (D)(1), the motion must be filed within 1 year

(a) after the fully retroactive change in the law is established when relief is sought under subsection (b);

(b) after the judgment of conviction is final when relief is sought under subsection (b), unless the facts on which the claim is predicated were unknown to the defendant and could not have been discovered earlier with due diligence, in which case the claim must be brought within 1 year of the discovery of these facts.

(2) If brought under subsection (D)(2), the motion must be filed within 1 year

(a) of the discovery of the new evidence, or the discovery of the significance of existing evidence, when relief is sought under subsection (a);

(b)after the judgment of conviction is final when relief is sought under subsection (b).

(F) Restoration of Appeal by Right. If the motion seeks a renewed opportunity for an appeal of right from a judgment of conviction and sentence that the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either

(1) disregarded the defendant's instruction to perfect a timely appeal of right; or

(2) otherwise failed to provide effective assistance and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right,

the trial court shall issue an order restarting the time in which to file an appeal of right.

~~(E)~~ **(G)** Ruling. The court, either orally or in writing, shall set forth in the record its findings of fact and its conclusions of law, and enter an appropriate order disposing of the motion.

Committee Comment

Paragraph (D) overview. The motion for relief from judgment was originally designed both to bring order and system to the then chaotic practice of postappeal review, and to provide a vehicle for the correction of egregious error; the subchapter was not designed as a "second appeal." Heightened standards of prejudice were promulgated, as well as the requirement that "cause" be shown for failure to raise the grounds originally in the appeal of right. Instead, motions for relief from judgment are filed routinely that barely attempt to show cause, and where prejudice as defined cannot be demonstrated. The motion for relief from judgment is employed as a second appeal, raising what might be called "garden variety" or routine appellate issues, rather than egregious errors, and much time by busy trial judges is spent going through these issues only to reach the conclusion that they cannot justify relief on a motion for relief from judgment. And in 1995 the Michigan Supreme Court amended the rules to allow only one motion for relief from judgment per judgment, with exceptions for newly discovered evidence and retroactive changes in the law. Still, there is no time limit on filing, and motions are routinely filed in cases dating back decades.

The committee determined that motions for relief from judgment should be limited to outcome-affecting errors, with a particular focus on actual innocence. Particularly with advances in technology, the committee believed it wise and just to provide for relief on a showing of actual innocence, even where the ordinary strictures of diligence required historically for newly discovered evidence claims cannot be met. The trade-off here is the elimination of the traditional

"newly discovered evidence claim"–still available during the initial appeal period–in favor of an actual innocence rule, with a heightened standard for relief, but no requirement of diligence in discovery of the evidence. Time limitations on the filing of the motion are also proposed, geared to the nature of the motion. So limiting the grounds for relief from judgment obviates the need for successive motion limitations, and for an examination into "cause" for the failure to raise the issue presented in the motion in the appeal of right, in the view of the committee.

The proposal does not include language precluding the filing of a motion raising grounds already litigated in the appeal of right. This seems superfluous–a lower court cannot overrule a higher court–and so goes without saying; further, the limitation on grounds for relief further obviates the need for stating the obvious. It is certainly not the intention of the committee that trial courts have authority to reconsider issues litigated in the appeal of right.

Paragraph ((D)(1)(a). This provision allows a mechanism for relief for changes in the law that are fully retroactive; that is, retroactive on collateral attack. Retroactivity generally falls into one of four categories. 1)Not retroactive, otherwise known as purely prospective, where the decision is not even applicable to the parties in the case. See e.g. *People v Stevenson*, 416 Mich 383 (1982) (year-and-a-day rule for causation for homicide abrogated, for held purely prospective). 2)Partially retroactive, in the sense of applying only to the parties in the case, and to trials after that date. See e.g. *People v Aaron*, 409 Mich 672 (1980) (common-law felony-murder rule abrogated, and held applicable to the parties in the case, and future trials); 3)Partially retroactive, in the sense of applying to the parties in the case and all cases pending on appeal with the issue properly preserved. See e.g. *People v Milbourn*, 435 Mich 630 (1990). 4)Fully retroactive, applying to all cases, including those where the direct appeal has been concluded before the new decision. See e.g. *Kitchens v Smith*, 401 US 847, 91 S Ct 1089, 28 L Ed 2d 519 (1971) (holding *Gideon* decision fully retroactive).

Paragraph (D)(1)(b). This provision is to provide a mechanism for relief for egregious errors that can be said to have affected the reliability of the outcome.

The standard for review on collateral attack must, in a rational system, be more onerous than that on direct appeal, where the standard for unpreserved error is the "plain error" standard, which applies equally to constitutional and nonconstitutional error. *People v Carines*, 460 Mich 750 (1999). That standard requires a demonstration of error, that is plain or obvious, that affects substantial rights, and to a degree that it resulted in the a miscarriage of justice, *or* the error seriously affects the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. This miscarriage of justice standard has been explained to mean that the error is one that undermines confidence in the reliability of the outcome. See e.g. *United States v Santisevan*, 39 F3d 250 (1994). The standard on collateral attack is intended to be more difficult than the plain error standard: "The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal." *United States v. Saro,* 24 F.3d 283, 287 (D.C.Cir.1994).

Because of the committee's determination that collateral attack should focus on outcome-affecting error, the standard chosen is akin to the plain-error standard, but in the conjunctive,

rather than the disjunctive; that is, while plain error allows error correction in rare circumstances where outcome is not affected by the error, on collateral attack the error must be of this sort of magnitude, but also affect outcome.

Paragraph (D)(2)(a). Though traditional newly discovered evidence claims may be made during the time for direct appeal, as time advances the ability of the State to achieve an accurate result through retrial is affected, and traditional newly discovered evidence standards do not equate to an "actual innocence" claim. The committee decided on a trade-off. A newly discovered evidence claim, allowing relief on a showing of the probability of a different result on retrial, but also requiring that the evidence not have been discoverable with reasonable diligence, is unavailable on a motion for relief from judgment, but in its place an "actual innocence" ground for relief is established, with a heightened burden on the defendant to gain relief, but, if that burden can be met, without restriction on diligence in discovering the evidence.

This provision does not apply to traditional claims challenging the weight or sufficiency of the evidence, or the fairness of the process that led to the conviction, but is reserved the for unusual case where a defendant can demonstrate that he or she was convicted of a crime that he or she in fact did not commit. To prevail, the defendant must show by clear and convincing evidence, taken together with all the evidence, that he or she is actually innocent of the crime. The language "taken together with all the evidence" allows a prosecutor to introduce evidence inadmissible at the trial but relevant on the issue of guilt or innocence, such as evidence suppressed on Fourth Amendment grounds, for the issue here is *actual* innocence. This is a substantial burden meant to set a high standard for relief so that trial courts may quickly dispose of most motions filed under this subsection, while still preserving the opportunity for the court to grant relief to correct a true miscarriage of justice.

It is important to bear in mind that the new evidence in these circumstances need not be the physical item involved itself, such as the stained clothing. That evidence may have been known at the time of trial, and/or since that time, but new testing of the item, such as DNA testing, may lead to *scientific results,* which are themselves "new evidence." And the language of the rule does not limit it to "new" evidence, though it is expected that ordinarily the evidence *will* be new in this sense. Rather, the rule deliberately refers to evidence not previously presented at any proceeding so as to include that rare circumstance where the parties may have overlooked evidence, particularly in the case of a guilty plea, which decisively shows innocence.

Paragraph (D)(2)(b). It also seems reasonable and just that a sentence that is simply outside the authority of the court to impose but that was somehow not challenged on direct appeal should be open to correction. This provision does *not* include guidelines-scoring claims, or guidelines departures, but sentences that exceed the statutory limitation (including the "2/3" rule for the minimum sentence). Substituting these grounds for relief, accompanied by time limitations in paragraph (E), for the current provisions in MCR 6.508 obviates, in the view of the committee, the "successive motion" provision of the current rule, and all inquiry into "cause" as currently required.

Paragraph (E). Federally, both as to collateral attacks of state and federal convictions, the attack must be brought within one year after the conviction is final. A conviction is final when

the direct appeal is concluded; most circuits include in the time calculation the time for filing a petition for certiorari (90 days), even when no petition is filed. If a petition *is* filed, then the conviction is final after the Supreme Court rules on it.[1] The United States Supreme Court has just granted certiorari on this question. Because, then, "finality" is a term of legal art, the committee did not propose to define it, but intends that the term be defined consistently with its use in the federal system, as ultimately determined by the United States Supreme Court. To create a longer time period for filing a motion for relief from judgment than exists in the federal system to file a habeas corpus petition from a "final" state conviction might lead prisoners to forfeit their habeas claims unwittingly, while a motion for relief from judgment filed within the federal period of limitations for habeas petitions will toll the running of the federal time limit.

Reworking of the grounds for relief as proposed above limits the need for a "statute of limitations" relating to the time of the finality of the conviction to (D)(1)(b) and (D)(2)(b). Where the claim is that an egregious error occurred that fits the description in (D)(1)(b), or that the sentence is one not permitted by law, but the claim was not raised on direct appeal, some time limit should be placed in relation to the judgment becoming final as defined above. "Cause and prejudice" requirements as defined in the current rule are unnecessary, however, for if the standard for relief is met then these conditions have, by definition, been shown. Using a one-year limitation period makes sense because it is sufficiently generous, and failure to raise the claim within one year of the judgment becoming final forfeits the claim for federal habeas corpus review. As indicated, a rule that encourages a filing that would preserve the claim from federal habeas corpus review seems advisable.

With regard to actual innocence claims and retroactive changes in the law, a limitation period relating to the finality of the judgment is inappropriate (though some states impose such a rule). On the other hand, an unlimited time to file once the grounds for relief are discovered is also inappropriate. Again, one year seems generous, the time running from the discovery of the facts supporting the actual innocence claim, or the significance of those facts, in those rare cases where the evidence is not "new" evidence, and from the retroactive change in the law, respectively.

There remains the danger that (D)(1)(b) will be abused; that is, that "garden-variety" issues will be raised, coupled with general language in the motion that the error is a violation of "due process," and a blanket assertion that without the error meets the described standard, so that motions will be filed looking very much like those currently filed that mimic a direct appeal. But at the least, the committee believes, *judges* will be able to more efficiently identify those claims that do not meet the standards of the rule than presently, saving them much time.

Paragraph (F). Another ground for relief of a different sort should be added. The Michigan Supreme Court has published for comment the following, explaining why the amendment is proposed. The trial court may not grant relief if the motion:

[1] Of course, if the petition is *granted*, the conviction is not final until the opinion of the Court is issued, if that opinion does not grant relief to the defendant.

(4) seeks a renewed opportunity for an appeal of right from a judgment of conviction and sentence that the defendant did not appeal within the time allowed by MCR 7.204(A)(2), unless the defendant demonstrates that the attorney or attorneys retained or appointed to represent the defendant on direct appeal from the judgment either

(a) disregarded the defendant's instruction to perfect a timely appeal of right; or

(b) otherwise failed to provide effective assistance and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right.

Staff Comment: Proposed new subrule (D)(4) would codify Roe v Flores-Ortega, 528 US 470; 120 S Ct 1029; 145 L Ed 2d 985 (2000).[2]

This proposed amendment allows the trial court to "grant relief" in this situation. If the defendant demonstrates the predicate of the rule–that through no fault of his or her own the defendant has been denied the appeal of right–the relief required under *Roe v Flores-Ortega* is the provision of an appeal by right, and thus the amendment suggested here alters that of the Supreme Court slightly to provide that upon a demonstration of the factual predicate the trial court must issue an order that restarts the time in which to file an appeal of right.

Because this paragraph does not actually provide relief from the judgment, but rather its reissuance, the committee suggests that it might be advisable to relocate this new provision as a new MCR 6.428, following the rule regarding the judgment order. An alternative proposal is included by the committee at that point.

RULE 6.509 APPEAL

(A) Availability of Appeal. Appeals from decisions under this subchapter are by application for leave to appeal to the Court of Appeals pursuant to MCR 7.205. The 12-month time limit provided by MCR 7.205(F)(3), runs from the decision under this subchapter. Nothing in this subchapter shall be construed as extending the time to appeal from the original judgment.

[2] Michigan Supreme Court Administrative File 01-27, published for comment January 16, 2002.

(B) Responsibility of Appointed Counsel. If the trial court has appointed counsel for the defendant during the proceeding, that appointment authorizes the attorney to represent the defendant in connection with an application for leave to appeal to the Court of Appeals.

(C) Responsibility of the Prosecuting Attorney. If the motion for relief from judgment was summarily dismissed without order for response from the prosecutor, relief may not be granted by an appellate court unless it first directs a response to the application be filed by the prosecuting attorney.

Committee Comment

Paragraph (C). The proposed new section (C) is intended to eliminate an anomaly in the current rules. The motion may be summarily dismissed by the trial court without calling for a response from the prosecutor, but relief may not be granted without ordering that response. But if an application for leave to appeal is filed in the Court of Appeals from a motion that was summarily dismissed, nothing prevents the Court of Appeals (or Supreme Court, if an application for leave is taken from the Court of Appeals to that court) from granting relief without ordering a response. This leaves prosecutors in the position of having to file answers in the appellate courts when none were required in the trial court as a matter of self-defense, and defeats the purpose behind the summary dismissal provision. The proposal simply "extends" the summary dismissal to the appellate courts, providing that no relief can be granted unless the appellate court first directs a response from the prosecutor.

DISTRICT COURT RULES

RULE 6.610 CRIMINAL PROCEDURE GENERALLY

(A) Precedence. Criminal cases have precedence over civil actions.

(B) Pretrial. The court, on its own initiative or on motion of either party, may direct the prosecutor and the defendant**, and, if represented**, ~~or~~ the defendant's attorney to appear for a pretrial conference. The court may require collateral matters and pretrial motions to be filed and argued no later than this conference.

(C) Record. Unless a writing is permitted, a verbatim record of the proceedings before a court under subrules (D)-(F) must be made.

(D) Arraignment; District Court Offenses.

(1) Whenever a defendant is arraigned on an offense over which the district court has jurisdiction, he or she must be informed of

(a) the name of the offense;

(b) the maximum sentence permitted by law; and

(c) the defendant's right

(i) to the assistance of an attorney and to a trial;

(ii) (if subrule [D][2] applies) to an appointed attorney; and

(iii) ~~(unless he or she is charged under an ordinance that does not correspond to a criminal statute or permit a jail sentence)~~ to a trial by jury**, when required by law**.

The information may be given in a writing that is made a part of the file or by the court on the record.

(2) An indigent defendant has a right to an appointed attorney whenever

~~(a)~~ the offense charged requires on conviction a minimum term in jail~~,~~ or **the court determines it might sentence to a term of incarceration, even if suspended.**

~~(b) the court determines that it might sentence the defendant to jail.~~

If an indigent defendant is without an attorney and has not waived the right to an appointed attorney, the court may not sentence the defendant to jail **or to a suspended jail sentence**.

(3) The right to the assistance of an attorney, to an appointed attorney, or to a trial by jury is not waived unless the defendant

(a) has been informed of the right; and

(b) has waived it in a writing that is made a part of the file or orally on the record.

(4) The court may allow a defendant to enter a plea of not guilty or to stand mute without formal arraignment by filing a written statement signed by the defendant and any defense attorney of record, reciting the general nature of the charge, the maximum possible sentence, the rights of the defendant at arraignment, and the plea to be entered. The court may require that an appropriate bond be executed and filed and appropriate and reasonable sureties posted or continued as a condition precedent to allowing the defendant to be arraigned without personally appearing before the court.

(E) Pleas of Guilty and No Contest. Before accepting a plea of guilty or no contest the court shall in all cases comply with this rule.

(1) The court shall determine that the plea is understanding, voluntary, and accurate. In determining the accuracy of the plea,

(a) if the defendant pleads guilty, the court, by questioning him or her, shall establish support for a finding that defendant is guilty of the offense charged or the offense to which he or she is pleading, or

(b) if the defendant pleads nolo contendere, the court shall not question him or her about his or her participation in the crime, but shall make the determination on the basis of other available information.

(2) The court shall inform the defendant of the right to the assistance of an attorney. If

~~(a)~~ the offense charged requires on conviction a minimum term in jail, ~~or~~

~~(b) the court determines that it might sentence the defendant to jail,~~ the court shall inform the defendant that if the defendant is indigent he or she has the right to an appointed attorney. **The court shall also give such advice if it determines that it might sentence to a term of incarceration, even if suspended.**

~~A subsequent charge or sentence may not be enhanced because of this conviction unless a defendant who is entitled to appointed counsel is represented by an attorney or waives the right to an attorney~~.

(3) The court shall advise the defendant of the following:

(a) the mandatory minimum jail sentence, if any, and the maximum possible penalty for the offense,

(b) that if the plea is accepted he or she will not have a trial of any kind and that he or she gives up the following rights that he or she would have at trial:

(i) the right to have witnesses called for his or her defense at trial,

(ii) the right to cross-examine all witnesses called against him or her,

(iii) the right to testify or to remain silent without an inference being drawn from said silence,

(iv) the presumption of innocence and the requirement that his or her guilt be proven beyond a reasonable doubt.

(4) A defendant **or defendants** may be informed of the trial rights listed in subrule (3)(b) as follows:

(a) on the record,

(b) in a writing made part of the file, or

(c) in a writing referred to on the record.

If the court uses a writing pursuant to subrule (E)(4)(b) or (c), the court shall address the defendant and obtain from him or her orally on the record, a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(5) The court shall make the plea agreement a part of the record and determine that the parties agree on all the terms of that agreement. The court shall accept, reject or indicate on what basis it accepts the plea.

(6) The court must ask the defendant:

(a) (if there is no plea agreement) whether anyone has promised the defendant anything, or (if there is a plea agreement) whether anyone has promised anything beyond what is in the plea agreement;

(b) whether anyone has threatened the defendant; and

(c) whether it is the defendant's own choice to plead guilty.

(~~6~~**7**) A plea of guilty or no contest in writing is permissible without a personal appearance of the defendant **and without support for a finding that defendant is guilty of the offense charged or the offense to which he or she is pleading** if

(a) the court decides that the combination of the circumstances and the range of possible sentences makes the situation proper for a plea of guilty or no contest;

(b) **the defendant acknowledges guilt or no contest, in a writing to be placed in the district court file,** ~~the court notifies the defendant~~ and **waives** in writing~~, in advance of a plea~~, ~~of the following:~~

~~(i) the sentence to be imposed in the particular case, and~~

~~(ii)~~ the rights enumerated in subrule (3)(b);

(c) and the court is satisfied that the waiver is voluntary~~; and~~

~~(c) the defendant acknowledges guilt or no contest, and the sentence to be imposed, in a writing to be placed in the district court file.~~

(~~7~~**8**) The following provisions apply where a defendant seeks to challenge the plea.

(a) A defendant may not challenge a plea on appeal unless the defendant moved in the trial court to withdraw the plea for noncompliance with these rules. Such a motion may be made either before or after sentence has been imposed. After imposition of sentence, the defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal under MCR 7.103(B)(6).

(b) If the trial court determines that a deviation affecting substantial rights occurred, it shall correct the deviation and give the defendant the option of permitting the plea to stand or of withdrawing the plea. If the trial court determines either a deviation did not occur, or that the deviation did not affect substantial rights, it may permit the defendant to withdraw the plea only if it does not cause substantial prejudice to the people because of reliance on the plea.

(c) If a deviation is corrected, any appeal will be on the whole record including the subsequent advice and inquiries.

(~~8~~ **9**) The state court administrator shall develop and approve forms to be used under subrules (E)(4)(b) and (c) and (E)(~~6~~**7**)(b) and (c).

(F) Discovery.

(1) Once a case is set for trial, a party must on request provide all other parties:

(a) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview, and

(b) if a party may call an expert, a curriculum vitae and either a report by the expert, or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion.

(2) Upon request, the prosecuting attorney must provide each defendant:

(a) any exculpatory information or evidence known to the prosecuting attorney;

(b) any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;

(c) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case.

(~~F~~G) Sentencing**.**

(1) At the sentencing, the court shall:

(**a**~~1~~) require the presence of the defendant's attorney, unless the defendant does not have one or has waived the attorney's presence;

(**b**~~2~~) give the defendant's attorney or, if the defendant is not represented by an attorney, the defendant an opportunity to review the presentence report, if any, and to advise the court of circumstances defendant believes should be considered in imposing sentence; and

(**c**~~3~~) inform the defendant of credit to be given for time served, if any.

(2) Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to an attorney, a subsequent charge or sentence may not be enhanced because of this conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this conviction.

(H) Motion for New Trial. A motion for a new trial must be filed within 21 days after the entry of judgment. However, if an appeal has not been taken, a delayed motion may be filed within the time for filing an application for leave to appeal.

(~~G~~I) Arraignment; ~~Circuit Court~~ Offenses Not Cognizable by the District Court. In a prosecution in which a defendant is charged with a felony or a misdemeanor not cognizable by the district court, the court shall

(1) ~~read the complaint or warrant into the record~~ **inform the defendant of the nature of the charge**;

(2) inform the defendant of

(a) the right to a preliminary examination;

(b) the right to an attorney, if the defendant is not represented by an attorney at the arraignment;

(c) the right to have an attorney appointed at public expense if the defendant is indigent; and

(d) the right to ~~be released on bond~~ **consideration of pretrial release.**

If a defendant not represented by an attorney waives the preliminary examination, the court shall ascertain that the waiver is freely, understandingly, and voluntarily given before accepting it.

~~**(H) Motion for New Trial.** A motion for a new trial must be filed within 21 days after the entry of judgment. However, if an appeal has not been taken, a delayed motion may be filed within the time for filing an application for leave to appeal.~~

Committee Comment

Paragraph (B): The Committee believes that the court should have authority under the rule to compel both the defendant and his or her attorney to appear for a pretrial conference, where the defendant is represented.

Paragraph (D)(2): A change has been proposed by the Michigan Supreme Court to respond to *Alabama v Shelton*, 122 S Ct 1764 (2002). The Committee's proposal differs slightly from that of the Court. The Court's existing proposal is that appointment of counsel–or a valid waiver–is required whenever the offense charged "might lead to incarceration." Because the offenses almost always, as a matter of statutory text, carry the possibility of a jail sentence, this language might be misleading, requiring the appointment of counsel even if the court intends to sentence to probation, on the theory that a violation of probation "might" lead to incarceration. Because *Shelton* is concerned with a suspended sentence of incarceration that is *automatically* imposed on a violation of probation, the Committee proposes language the defendant has a right to an

appointed attorney whenever the offense requires a minimum term in jail on conviction, or the court determines to might sentence to a term of incarceration, even if suspended.

Paragraph (E)(2): A change has been proposed by the Michigan Supreme Court to respond to *Alabama v Shelton*, 122 S Ct 1764 (2002). The Committee's proposal differs slightly for the same reasons stated regarding paragraph (D).

Paragraph (E)(4): Language is added consistent with the felony guilty plea rule to make clear that the rights may be given to more than one defendant at a time.

Paragraph (E)(6). Currently there is nothing in the rule regarding questioning the defendant regarding any threats or promises to obtain the plea; language is simply copied from the felony rule.

Paragraph (E)(7) (formerly (6): The District Court Judges on the Committee observed that a factual basis is not generally taken on a plea by mail, and that obtaining one is not practical. The proposal takes account of this practice.

New Paragraph (F): Currently the District Court rules have no discovery provisions, and it is unclear whether and to what extent district court judges have authority to grant discovery. The Committee feels rudimentary discovery in the form of witness lists, especially with regard to any possible expert testimony, and, on the part of the prosecuting attorney, any exculpatory information as well as any statements of the defendant or codefendants or accomplices, was reasonable, along with any search warrant materials. To avoid much unnecessary discovery, however, this rule is triggered only once a case is set for trial and not before.

Paragraph (G)(current paragraph (F)): This is an amendment proposed by the Court and currently pending. Though the Committee questions whether the amendment is appropriate as new paragraph (2) simply states a principle of law and not a rule of procedure, the Committee determined not to suggest an alternative.

Current Paragraphs (G) and (H): The Committee believes that current paragraph (H) on new trials should follow sentencing rather than precede it.

Paragraph (I): The heading is changed to comport to the text (offenses not cognizable by the district court) rather than "circuit court offenses" given unified courts.

Paragraph (I)(1): Simply makes explicit a common practice–that the reading of the complaint and warrant may be waived.

Paragraph (I)(2)(d): A defendant arraigned on a charge not cognizable in the district court does not have a "right" to bond–in some circumstances he or she may be remanded.

RULE 6.615 MISDEMEANOR TRAFFIC CASES

(A) Citation; Complaint; Summons; Warrant.

(1) A misdemeanor traffic case may be begun by one of the following procedures:

(a) Service by a law enforcement officer on the defendant of a written citation, and the filing of the citation in the district court.

(b) The filing of a sworn complaint in the district court and the issuance of an arrest warrant. A citation may serve as the sworn complaint and as the basis for a misdemeanor warrant.

(c) Other special procedures authorized by statute.

(2) The citation serves as a summons to command

(a) the initial appearance of the defendant; and

(b) a response from the defendant as to his or her guilt of the violation alleged.

~~(3) A single citation may not allege both a misdemeanor and a civil infraction.~~

(B) Appearances; Failure to Appear. If a defendant fails to appear or otherwise to respond to any matter pending relative to a misdemeanor traffic citation, the court shall proceed as provided in this subrule.

(1) If the defendant is a Michigan resident, the court

(a) must initiate the procedures required by MCL 257.321a; MSA 9.2021(1) for the failure to answer a citation; and

(b) may issue a warrant for the defendant's arrest ~~after a sworn complaint is filed with the court~~.

(2) If the defendant is not a Michigan resident,

(a) the court may mail a notice to appear to the defendant at the address in the citation;

(b) the court may issue a warrant for the defendant's ~~arrest after a sworn complaint is filed with the court~~; and

(c) if the court has received the driver's license of a nonresident, pursuant to statute, it may retain the license as allowed by statute. The court need not retain the license past its expiration date.

(C) Arraignment. An arraignment in a misdemeanor traffic case may be conducted by

(1) a judge, or

(2) a district court magistrate as authorized by statute and by the judges of the district.

(D) Contested Cases.

(1) A contested case may not be heard until a citation is filed with the court. If the citation is filed electronically, the court may decline to hear the matter until the citation is signed by the officer or official who issued it, and is filed on paper. A citation that is not signed and filed on paper, when required by the court, ~~will~~ **may** be dismissed with prejudice.

(2) A misdemeanor traffic case must be conducted in compliance with the constitutional and statutory procedures and safeguards applicable to misdemeanors cognizable by the district court.

(E) Appeal. An appeal from a misdemeanor trial is governed by subchapter 7.100.

Committee Comment

Paragraph (A)(3): The restriction against charging a civil infraction and a misdemeanor on the same ticket is inconsistent with common practice; further, the Committee's District Court judges and members who practice in the district courts believe it is in fact counterproductive to order and efficiency. The Committee proposes to delete it.

Paragraph (B): The language "after a sworn complaint is filed with the court" as a predicate to issuance of a warrant for the defendant's arrest for failure to appear on a citation is deleted as unnecessary.

Paragraph (D): The Committee believes that the requirement in the rule for mandatory dismissal with prejudice of a citation that is not signed and filed on paper when required by the court is draconian, and believes that instead judges should be given the discretion to dismiss with prejudice.

RULE 6.620 IMPANELING THE JURY

(A) Alternate Jurors. The court may direct that 7 or more jurors be impaneled to sit in a criminal case. After the instructions to the jury have been given and the case submitted, the names of the jurors must be placed in a container and names drawn to reduce the number of jurors to 6, who shall constitute the jury. The court may retain the alternate jurors during deliberations. If the court does so, it shall instruct the alternate jurors not to discuss the case with any other person until the jury completed its deliberations and is discharged. If an alternate juror replaces a juror after the jury retires to consider its verdict, the court shall instruct the jury to begin its deliberations anew.

(B) Peremptory Challenges.

(1) ~~Each party in a criminal case~~ **Each defendant** is entitled to three peremptory challenges. ~~In a case involving two or more jointly tried defendants, each defendant is entitled to three peremptory challenges~~. **The prosecutor is entitled to the same number of peremptory challenges as a defendant being tried alone, or, in the case of jointly tried defendants, the total number of peremptory challenges to which all the defendants are entitled.**

(2) Additional Challenges. On a showing of good cause, the court may grant one or more of the parties an increased number of peremptory challenges. The additional challenges granted by the court need not be equal for each party.

Committee Comment

Paragraph (B): The paragraph is changed as a matter of style both to comport with the felony rule, and to provide that, as with the felony rule, the prosecutor in the case of multiple defendants gets the same total number as the defendants together. The provision from the felony rules allowing additional challenges within the discretion of the court is also included for the rare case when this might be needed.

RULE 6.625 APPEAL; APPOINTMENT OF LAWYER

An appeal from a misdemeanor case is governed by subchapter 7.100. An indigent defendant who pleads guilty, guilty but mentally ill, or nolo contendere is entitled to the assistance of assigned appellate counsel at public expense if the prosecution seeks leave to appeal or the Court or Appeals or the Supreme Court grants the defendant's application for leave to appeal.

Committee Comment

No change.

SUBCHAPTER 6.900

The subchapter on rules applicable to juveniles charged with life offenses subject to the jurisdiction of the district and circuit courts were the work of a separate committee appointed by the Court, and new rules have been adopted. This subchapter was thus not within the charge of this Committee.